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No. 85-6964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE ROBERT BUNDY, Petitioner,

v.

STATE OF FLORIDA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

James E. Coleman, Jr.,*
Polly J. Nelson,
Wilmer, Cutler & Pickering
1666 K Street N.W.
Washington, D.C. 20006
(202) 872-6000

*Counsel of Record

May 21, 1986

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QUESTION PRESENTED

Where crucial and prejudicial testimony by the state's only alleged eyewitness was held to have been unconstitutionally admitted because of its conceded unreliability and resistance to cross-examination, may petitioner's conviction and sentence of death nevertheless be upheld on the ground that there is no reasonable possibility that the improperly admitted evidence contributed to the jury's decision?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION AND TIMELINESS OF THE PETITION 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 23

I. Petitioner Was Denied Due Process Of Law, His Right To Trial By Jury, And His Right To Confront Witnesses When The Supreme Court Of Florida Affirmed His Conviction And Sentence Of Death On The Basis Of Harmless Constitutional Error Despite Finding That The Hypnotically-Enhanced Testimony Of The State's Crucial Eyewitness Was Unreliable As A Matter Of Both Law And Fact 23

A. The Florida Supreme Court this Court's Harmless Error Rule in Concluding that There Was No Reasonable Possibility that the Unreliable Testimony of Clarence Anderson Contributed to Petitioner's Conviction 24

B. The Court Below Arbitrarily and Capriciously Determined that Mr. Anderson's Testimony was Altered by the Two State-Sponsored Hypnosis Sessions "Only" as to the Color of the Victim's Jersey, the Number on the Jersey, and Attire of the Perpetrator 29

1. The Court Below Improperly Applied a "Sufficiency of the Evidence" Standard of Review for Harmless Error 30

2. The Determination of the Court Below that Mr. Anderson's Recall was Affected Only to the Extent of Three Details is Inconsistent with the Court's Own Findings on the Effects of Hypnotism 30

3. The Court Improperly Determined that there Was No Possibility that the Unreliable, Hypnotically-Induced "Three Details" in Mr. Anderson's Testimony Could Have Influenced a Reasonable Juror 35

CONCLUSION 39

APPENDIX 40

Opinion and Judgment of the Supreme Court of Florida A1

Transcript of Initial (Pre-Hypnosis)
Statement of Clarence Anderson,
July 28, 1978 ..... A17

Transcript of Statement of Clarence Anderson
During Hypnosis Session Conducted by
Imogene Keene, July 28, 1978 ..... A22

Transcript of Statement of Clarence Anderson
During Hypnosis Session Conducted by
Johnny Jack Burnette, July 31, 1978 ..... A37

Transcript of Trial Testimony of
Clarence Anderson A52

Appellant's Motion for Rehearing and
Clarification A178

TABLE OF AUTHORITIES

Page

Bundy v. State, 471 So. 2d 9 (Fla. 1985)..... passim

Bundy v. State, 455 So. 2d 330 (1984), cert. denied, No. 85-6276 (May 5, 1986)..... 20

Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982)..... 31

Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981)..... 19

Fahy v. Connecticut, 375 U.S. 85 (1963)..... 21,30

Harrington v. California, 395 U.S. 250 (1969)..... 25,28

Harris v. Wainwright, 760 F.2d 1148 (11th Cir. 1985)..... 26

Holland v. Attorney Gen. of New Jersey, 777 F.2d 150 (3d Cir. 1985)..... 26

Kampshoff v. Smith, 698 F.2d 581 (2d Cir. 1983)..... 26

People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982)... 20,31

People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 459 U.S. 860 (1982)..... 19

Rose v. Engle, 722 F.2d 1277 (6th Cir. 1983), cert. denied, 105 S.Ct. 1353 (1985)..... 26

Schacht v. United States, 398 U.S. 58 (1970)..... 2

Schneble v. Florida, 405 U.S. 427 (1972)..... 21,24,30

Skipper v. South Carolina, 106 S.Ct. 1669, 54 U.S.L.W. 4403 (April 29, 1986)..... 25

State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982)..... 17

State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981)..... 18

State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981)..... 17,31

United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984)..... 25

Rules

Rule 20 of the Rules of the Supreme Court..... 1

Miscellaneous

Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical & Experimental Hypnosis 311 (1979)..... 18

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October Term, 1985

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v.

STATE OF FLORIDA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

The petitioner, Theodore Robert Bundy, respectfully prays that a writ of certiorari issue to review the judgment of conviction and sentence of death entered by the Circuit Court of Columbia County, Florida, and affirmed by the Supreme Court of Florida in an opinion entered in the above-entitled proceeding on May 9, 1985.1/

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 471 So. 2d 9 (1985), and is reprinted in the appendix hereto at 1.

JURISDICTION AND TIMELINESS OF THE PETITION

Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

Under Rule 20 of the Rules of this Court, a petition for a writ of certiorari would have been deemed timely if filed

---

1/ In a separate, but similarly-entitled, petition for a writ of certiorari, No. 85-6276, petitioner sought review of his conviction and sentence of death entered by the Circuit Court of Dade County, and affirmed by the Supreme Court of Florida on June 21, 1984. This Court denied that petition on May 5, 1986.

within 60 days after the Florida Supreme Court denied rehearing on July 11, 1985. This petition thus is out of time. In light of the Court's recognition that untimeliness of a petition for a writ of certiorari is not a jurisdictional defect, Schacht v. United States, 398 U.S. 58, 63-64 (1970), petitioner respectfully requests that the Court consider his petition notwithstanding its untimeliness.

Petitioner engaged his undersigned counsel in response to the suggestion of a Justice of this Court in February 1986 that he obtain counsel for the purposes of seeking a stay of execution of the sentence of death imposed following petitioner's first Florida conviction, No. 85-6276. This Court subsequently granted petitioner a stay and permitted him to supplement, through counsel, his pro se petition for a writ of certiorari in that matter. Petitioner filed his supplement on March 28, 1986. The Court denied the petition on May 5, 1986. While preparing petitioner's supplement, counsel became aware of the separate conviction and sentence of death which is the subject of the present petition. Counsel advised petitioner that the matter should be reviewed as quickly as possible to determine if it presented issues worthy of certiorari, in light of its untimeliness. On April 17, 1986, petitioner requested counsel to conduct such a review.2/

Petitioner has filed the present petition in as expeditious a manner as possible under the circumstances, and in his best effort to conform to the Rules of the Court.

2/ On May 1, 1986, petitioner informed the Court by Supplemental Brief in his prior petition, No. 85-6276, that he would file the present petition no later than Friday, May 16, 1986. The filing of the petition was delayed slightly due to efforts to obtain missing record volumes and unanticipated emergency litigation that arose last week in petitioner's first case.

STATEMENT OF THE CASE

Petitioner was arrested on February 15, 1978 for possession of a stolen car and credit cards. Soon thereafter, he came under investigation for the February 9, 1978, disappearance of twelve year-old Kimberly Leach from Lake City, Florida, and the January 15, 1978, murders at the Chi Omega sorority house in Tallahassee.

The publicity accompanying the charges against petitioner reached such unprecedented proportions that Judge Charles E. Miner of the Circuit Court of Leon County, in a May 1978 order denying direct press access to petitioner, stated:

> Virtually no aspect of Bundy's past or present life, real or imagined, has evaded media discovery, analysis and comment. Fact, speculations, characterization and impression have combined to give Theodore Bundy, wanted or not, a mystique of sorts. He enjoys (or tolerates, as the case may be) a name identification in this area of Florida at least equal to that of Florida's most notable p r-sonages.
>
> As of this day there is no indication that either the public or media interest in Theodore Bundy is on the wane. . . . .

(Record on Appeal [hereinafter "R."] at 14239).

The extensive search for Kimberly Leach prompted frequent news reports asking for information and giving a description of the victim and her attire. When last seen -- and when her body was recovered -- Kimberly Leach's clothing included blue dungarees, a white turtleneck, a long sleeve blouse, a football jersey with "83" on the front, a blue denim bag, and a tan vinyl coat with fur trim. (R. 3876). Kimberly Leach had been reported missing by authorities of the Lake City Junion High School when

she failed to return to class after leaving one of the school buildings to retrieve her pocketbook from another building.

In July 1978, grand jury indictments for murder were issued against petitioner in both the Lake City and Tallahassee cases, and parallel criminal proceedings began in each jurisdiction.3/

Following petitioner's indictment for murder of Kimberly Leach, the State obtained its most significant piece of evidence: the testimony of Clarence ("Andy") Anderson, the prosecution's only alleged eyewitness to the abduction of Kimberly Leach, and the only witness who associated petitioner with that abduction.

Mr. Anderson was an employee of the Lake City Fire Department when he made his first report to the police on July 28, 1978. Mr. Anderson's report came more than five months after petitioner was arrested, more than two months after Judge Miner noted the unprecedented news media attention on petitioner, and one week after petitioner was indicted for the kidnapping and murder of Kimberly Leach. Mr. Anderson later admitted that, prior to coming forward, he was aware of the publicity tying petitioner to the kidnapping of Kimberly Leach and had seen news photographs of both the petitioner and the victim. (R. 4136-46, Appendix to the Petition [hereinafter "A."] 132-42). Mr. Anderson explained that he had not come forward earlier because, although he had had "a nagging feeling" that he had seen Kimberly Leach, he also had "a lot of doubt." (See R. 4132, A. 129).

3/ Both courts rejected petitioner's request to admit his choice of counsel pro hoc vice. After representing himself for several months, petitioner received the services of appointed local counsel in each case.

The Chief Justice of the Florida Supreme Court characterized Mr. Anderson's testimony at trial as "the crucial link in the chain of circumstantial evidence of [petitioner's] guilt." 471 So. 2d at 24.4/

4/ Indeed, the remaining evidence against petitioner consisted of the following:

- A man later identified as petitioner fled from a police officer who inquired about a license tag on the floor of his car.
- Following petitioner's arrest, a police detective reported that his fourteen-year-old daughter had been approached in a shopping center parking lot the day before the abduction by a man driving a white van with license tag numbers later identified as the same as those found on the floor of petitioner's car. The girl and her brother, who had also observed the driver and license tag, were later hypnotized by the police to improve their recollection. Police composites were made from each child's description after the hypnotic sessions. Eventually, when presented with a photo lineup, the children identified petitioner as the man they had seen.
- A white van reported stolen from the University of of Florida was recovered several days after the abduction. Fingerprints and hair sample comparisons taken could not be linked to the petitioner or the victim. Soil samples taken from the van were different from those taken from the crime scene. Blood stains on the van's carpet were identified as group B -- a blood type common to fifteen percent of the population, including the victim. A fiber analyst testified that it was "extremely probable" that clothing of both petitioner and the victim had come into contact with the University van's carpet, and that "probably" the clothing of each had come into contact with each other.
- Two Lake City hotel employees and the State's handwriting expert testified that petitioner had registered at the hotel under another name the night before the abduction.
- A school crossing guard testified that he saw a man whom he identified as petitioner driving a white van in front of the school on the day that the victim was abducted from the school.

See 471 So. 2d at 12.

I. The Pre-Hypnotic Statement of Clarence Anderson

According to Mr. Anderson, he was prompted to make his report to the police when someone called his attention to the television at the fire station by saying "something to the effect" that "there's Bundy, the guy accused of killing the co-eds -- and the Leach girl." (R. 13963). Mr. Anderson stated that when he saw the television broadcast of petitioner leaving the courthouse after his indictment, he thought petitioner resembled a man he had seen several months earlier with a dark-haired girl in a white van in front of the Junior High School from which Kimberly Leach was abducted. (R. 13961). He made his report to Chief Philpot, Investigator Daugherty, and Prosecutor Dekle that same day. The fire station was in the same building as the police department and Mr. Anderson was well-known to Investigator Daugherty. (R. 13881).

In his initial interview -- the only statement Mr. Anderson gave before being hypnotized -- Mr. Anderson stated that on his way home from work one morning several months earlier, perhaps in April, he saw a man lead a little girl by the elbow to a white van, that the girl had an unhappy look on her face as if she had gotten in trouble in school and was being taken home by her father, and that the man helped the girl get in the van and drove off. Mr. Anderson described the man as of medium build, 5'7" to 5'10", with medium or darker brown wavy hair. Mr. Anderson said that the man was wearing a light shirt or jacket and that he could not remember what type of slacks he wore. Mr. Anderson described the girl as having shoulder-length brown hair parted in the middle and looking to be about 12 or 13 years old. He stated that she wore "dungarees or slacks and a dark pullover and she was carrying something in her hand, I don't

know if it was a sweater or jacket or large pocketbook." (R. Vol. 146, A.20)

Mr. Anderson said that he did not recall anything distinctly about the man. Id. He also stated that the windows in the rear of the van were covered up so that, after the man and the girl entered the van, all Mr. Anderson could see was the back of the van. Id.

II. The First Hypnosis Session

In order to improve Mr. Anderson's recollection, the police arranged to have him hypnotized later that same day by Imogene Keene. Ms. Keene was a social worker at the Veterans Administration hospital. The investigator and prosecutor attended the hypnosis.

Under hypnosis, Mr. Anderson stated that the girl was "12 or 13 maybe 14", "about 5'5" . . . 5'6, maybe not that tall," that she was slim and had black hair to her shoulders, parted in the middle. (R. Vol. 146, A. 24). Mr. Anderson stated that the girl was wearing "bluish" pants, "possible dungarees," and a dark pullover that was blue in color but had no designs on it. Id. at 24-25. When asked whether he could see the girl's face, Mr. Anderson replied that he could not. Ms. Keene then repeated the trance-inducing procedure and asked Mr. Anderson what kind of expressions he saw on the girl's face. Mr. Anderson answered that the girl was crying. Id. at 26. Ms. Keene then elicited a description of the man and girl walking to the van and of what the girl was carrying:

Mr. Anderson: He leads her in front of the van.

Ms. Keene: In front of the van . . . . .

Mr. Anderson:	And opens the door on the passenger's side and helps her get in and slams the door and then runs to the driver's side.
Ms. Keene:	And did you say runs to the driver's side? Did you . . . can you see his shoes?
Mr. Anderson:	No. They drive off.
Ms. Keene:	Can you back just a little bit as you saw the man helping . . . putting the girl into the van, was she carrying anything?
Mr. Anderson:	Yes.
Ms. Keene:	Describe it. What was it? An object or what? Can you . . . . ? Okay.
Mr. Anderson:	I can't remember but I think it was dark.
	**********
Mr. Anderson:	It could be a rolled up jacket or a medium sized handbag.
Ms. Keene:	Okay, Okay, very good. . . . . Okay, again can you tell me more of the color of the object she's carrying?
Mr. Anderson:	No. It's dark.
Ms. Keene:	Dark? Is it like black or brown or green or .....?
Mr. Anderson:	Dark blue or black or dark brown.

Id. at 26-27.

Ms. Keene was unable to elicit a more detailed description of the man than Mr. Anderson previously had provided. She was able to get Mr. Anderson to describe the license plate on the van as a green and white Florida license plate (when presented with a picture of the license plate of the stolen van at trial, Mr. Anderson conceded that it did not match his description. (R. 4175, A. 171)), but he could not recall the numbers.

Mr. Anderson stated that there were three cars between his truck and the van. He said that after making his observation he arrived home a little after 9:00 a.m., took a shower, and went to bed at 9:30 or 9:45 and slept until noon. Mr. Anderson repeated that he thought he had seen the man and the girl in April, but could not recall the exact date.

III. Events Occuring Between the Two Hypnosis Sessions

Mr. Anderson was then sent home with instructions to try to recall the date of his observation:

> A. They told me to go home and think about it, and I went home. I talked it over with my wife. I was very concerned about it, very upset about it. I didn't even know what day the girl went missing. I believe my wife said it was around the time of our little girl's birthday and then it began to dawn on me as I went over it in my mind that I saw the little girl and the man coming home from the fire department the day after my little girl's birthday.

(R. 4088, A. 85).

Before the second hypnotic session, the investigators searched Mr. Anderson's employment records and discovered that he had been working on February 9. He therefore could not have been going home to sleep, as he told the police he had been, on the day he claimed to have seen the man and girl.

IV. The Second Hypnosis Session

On July 31, three days after Mr. Anderson's initial report and hypnosis session, the police and prosecutor had Mr. Anderson hypnotized a second time because they still were unsatisfied with the level of detail he had thus far provided. The second session was conducted by Johnny Jack Burnette, a co-worker of Ms. Keene's who had taken a hypnosis course with

Ms. Keene the year before. Mr. Burnette had never before conducted a forensic hypnotic session. (R. 7891).

During this second hypnotic session, Mr. Anderson described for the first time his activities before beginning the drive home:

> MR. ANDERSON: I'm at the station drinking coffee. On coming shift . . . my shift is coming on . . . day shift is going off . . . 8:15 we're drinking coffee and start doing our chores. Start checking on . . . drug cabinet . . . I've assigned everybody work detail . . . check out the drug cabinet . . . I've been on . . . been at the station all night. I need a shower and a shave. I asked the assistant chief if it be okay if I run home, change clothes and shower . . . he asked me if there was another paramedic on duty and I told him yes, Robert Dortch.

(R. Vol. 146, A. 46).

He then "recalled" that the man he had seen with the girl wore a white jacket or a white pullover with a shirt underneath. He said that the van was a Chevrolet and had glass windows in both rear doors. Mr. Anderson said that he was able to see through the rear windows that the man was scolding the girl. He next described a very different version of his activities for the remainder of the day than he had reported to the police or recalled with Ms. Keene: "I continue on home, ask my wife to iron me a shirt, I take a shower, I finish my shower, eat a piece of my baby girl's birthday cake and go back to work." Id.

Mr. Anderson described the man as "fairly young, 29, 30, 31. Good looking . . . I can't see his eyes, clean shaven, weighs about 160, 165 at the most." Id. He described the girl's clothing as a blue "football jersey" with two numbers, one being "3" and the other being "6" or "8," and that she carried a dark

brown pocketbook. Id. at 47. When asked the date of the observation, Mr. Anderson said "February the 9th." Id. When asked how he knows this is the date, Mr. Anderson replied: "Because I worked that day ah . . . February the 8th is my little girl's birthday." Id.

Before removing Mr. Anderson from the trance, Mr. Burnette told him: "You will have complete memory for your hypnotic session. Your will remember all the details that you discussed with me under hypnosis." Id.

Mr. Burnette later recalled that one of the purposes of the second hypnotic session was to determine the date of Mr. Anderson's observation and that Mr. Anderson told him at the beginning of the session that he still could not recall the date. (R. 7909, 7924). Ms. Keene and Mr. Burnette later stated in depositions that the second hypnosis session produced more detailed statements in general (R. 7964, 8228), and specifically elicited a more complete description of the appearance and clothing of the man and girl (R. 7931, 7954); the date of the abduction, (R. 7964); and that the van bore a Florida license plate (R. 7944, 8228).

V. The Pretrial Motion to Suppress Anderson's Testimony

At trial, petitioner moved to suppress the testimony of several witnesses, including Mr. Anderson, whose memory had been affected or altered by hypnosis. At the suppression hearing, two experts in hypnosis testified on behalf of the petitioner about the suggestiveness of the hypnotic sessions conducted with Clarence Anderson and both noted some of the specific changes in Mr. Anderson's statement elicited during the sessions. For example, one of the experts, Dr. David Kuypers, testified that

Ms. Keene improperly asked Mr. Anderson to describe the girl's face, even though Mr. Anderson had said that he could not see her face; Keene's question suggested to the hypnotized Mr. Anderson that he could remember the details sought, even if he could not, and therefore the question was designed to produce a response. (R. 10942). According to Dr. Kuypers, "[t]hat kind of procedure increases dramatically the probability that you will get a confabulatory response." In this case, Mr. Anderson responded that "she's crying."

Dr. Kuypers also testified that if Mr. Anderson had learned facts relating to the incident between the two hypnosis sessions, it was possible that the second session would validate that information for him and increase his confidence. (R. 10946). Dr. Kuypers stated that there was a "high probability" that Mr. Anderson's statement concerning the numbers on the jersey and his "recollection" of the date in terms of his daughter's birthday resulted from confabulation of facts derived from newspapers and other sources. (R. 10956).

When asked to list the variances in Mr. Anderson's statements, Dr. Kuypers testified that they included the date of the occurrence; the description of what Mr. Anderson was doing that day both at work and at home; the numbers on the jersey; the man's weight; the fact that the man was clean shaven; the change in the description of the man's clothing from a light shirt or jacket to a white pullover with a shirt underneath; the change in the description of the van from covered rear windows to windows Mr. Anderson could see through; the change in his ability to see the man and the girl from the rear of the van. (R. 10955).

The court denied Petitioner's motion to suppress the testimony of Clarence Anderson.

VI. Anderson's Trial Testimony

At trial, Mr. Anderson testified as follows:

Q. What, if anything, did you observe in the vicinity of Lake City Junior High School on that morning as you travelled to your home?

A. The first thing I noticed was there was a white van parked in the westbound lane of Duval Street, that, as I approached it, several cars had, were going around it. There were still two cars behind the van and then my truck. And I was sitting there waiting for the truck to move or waiting for traffic to clear so I could go around it. And on my left, I noticed a young girl, approximately twelve or thirteen years old, dark hair, shoulder length, parted in the middle. Probably the only reason I noticed this girl was she looked very much like one of my nieces.

Q. Was there anyone with the young girl?

A. Yes, sir. With her was a man, approximately early thirties, had brown hair, you know, light to dark brown hair, was full cut of hair. It was one of the things that I really paid any attention to as far as the man was concerned. It was kind of wavy, but it was full cut, you know, really a nice head of hair.

I got the impression that the young girl was either crying or had been crying. The man had a scowl on his face. And I felt like probably the girl had gotten in trouble at the school or misbehaved in some way and had called her father to come pick her up and take her home. And as I was sitting there, watching them, I remember thinking to myself, you know, the daddy is going to take the little girl home and probably, you know, give her a spanking or something like that.

Q. Would you tell us how the girl was dressed, as you recall?

A. She was wearing a pullover football jersey and probably dungarees.

Q. What was the color of the football jersey?

A. It was dark blue.

Q. Did the jersey have any distinguishing marks or characteristics?

A. Yes, sir. It had some letters on it, "63" or "68", red-orange, something like that.

Q. Did the girl appear to be carrying anything?

A. Yes, sir. In her left arm, kind of clutched to her chest like this (demonstrating), was a medium-sized object like, so it could have been a pocketbook or a rolled-up jacket or maybe both. [On cross-examination, he stated that it was "probably a purse." (R. 4176, A. 172)] I don't know. The man had her by her left arm, right about the elbow, and he was leading her towards the white van. The little girl was not actually resisting. It was pretty evident that, that, you know, she wasn't really anxious to go. They was, from the sidewalk, probably six to ten feet from the sidewalk when I first saw them. They continued to walk to the sidewalk. He stopped--

Q. Did the man have the girl by the left arm during the entire time that you observed them?

A. Yes, sir. They stopped and a car came by, going east, and they crossed in front of the white van. The man opened the door.

Q. Which door did he open?

A. The door on the passenger side. And helped the girl get in the van, slammed the door, and kind of jogged in front of the van, got in the passenger side, and they drove off.

(R. 4063-65, A. 60-62).

* * *

Q. Were you able to tell how the man was dressed?

A. Yes, sir. He had a pullover sweater, with a shirt underneath the sweater. I don't recall the exact color of either one of them. The sweater was a neutral color, tan, light grey, something like that. I don't recall the color of his trousers.

Q. You have described the van as being a white van. Can you give any further description of it, particularly with respect to any windows?

A. All I seen was a, was the very back of it and it had two windows, the rear doors. (R. 4068, A. 65).

* * *

> Q. Were you able to observe the driver as he was stopped at the red light there at 7th Street?
>
> A. Some. I could see through the rear window. I could see more of a silhouette than anything else. And he was turned to the passenger side. . . . (R. 4069, A. 65).

* * *

Mr. Anderson then identified the petitioner as the man in the van by pointing him out in the courtroom, and identified a picture of the victim as the girl he had seen get into the van on February 9.

As to how he recalled the date he saw the man and the girl, Mr. Anderson testified as follows:

> A. They [Chief Philpot, Investigator Dougherty, and Prosecutor Dekle] told me to go home and think about it, and I went home. I talked it over with my wife. I was very concerned about it, very upset about it. I didn't even know what day the girl went missing. I believe my wife said it was around the time of our little girl's birthday and then it began to dawn on me as I went over it in my mind that I saw the little girl and the man coming home from the fire department the day after my little girl's birthday.
>
> Q. What was your little daughter's birthday?
>
> A. February the 8th.
>
> Q. Had you planned any events in connection with her birthday or what caused you to focus attention on her birthday?
>
> A. My wife had planned a party where some of her friends and a movie, and I was looking forward to, you know, going to the party and taking the kids to the movies, you know, helping chaperone the kids. And I didn't make it because I was working overtime at the fire station. I got called in quite often that day to work overtime. It seemed like every time I went home, I walked in the door, the phone would be ringing and them asking me to come back down to the fire station and, late that afternoon, I got a call to go back down to the fire station, they had a trip going to Gainesville, and we needed the

money, so I went and I called my wife and told her that I'm sorry, go ahead and take the kids to the party and the movie, I wasn't going to be able to make it.

Q. Okay. What, if anything, happened on February the 9th, after you got home, that allowed you to tie that incident in with your little girl's birthday party?

A. I remember going in. I remember feeling guilty about not being with the kids at the party. Well, the first thing I did was eat a piece of my daughter's birthday cake. I asked my wife to iron me a shirt, a uniform shirt. I think probably eating the cake and just I remember feeling guilty about not making the party makes me remember it as clear as anything else.

Q. Okay. And are you certain in your own mind, as you have testified this morning, on February the 9th is the date that you made those observations that you have described to the Court?

A. Yes, sir.

(R. 4087-88, A. 84-85).

Finally, Mr. Anderson testified that hypnosis had refreshed his recollection only as to the numbers on the girl's jersey and the fact that the man wore a pullover sweater and a shirt. (R. 4090, A. 87).

VII. Decision of the Florida Supreme Court

On appeal, the Florida Supreme Court succinctly described the evolution of Mr. Anderson's testimony as follows:

> The state's one eyewitness to the abduction of Kimberly Leach was Clarence Anderson. On July 18 [sic], 1978, Anderson reported to the Lake City Police Department that the profile of a person he had seen on a television newscast bore a striking resemblance to the man that he had observed with a girl near the Lake City Junior High School several months earlier. Assistant State Attorney Dekle asked Anderson to undergo hypnosis to refresh his memory. Anderson agreed and was hypnotized twice. Thereafter, he stated that on February 9, 1978, he noticed a man leading a young girl into a white van near the Lake City Junior High School. Anderson identified

> the young girl as Kimberly Leach and the man in the van as Theodore Bundy.

471 So. 2d at 12-13.

In evaluating petitioner's claim that Mr. Anderson's testimony should have been suppressed because of his hypnosis, the Florida Supreme Court quoted with approval the analysis of several prominent courts that have recognized the dangers of hypnotically-enhanced testimony. The court noted that the Arizona Supreme Court observed in State v. Mena, 128 Ariz. 226, 230, 624 P.2d 1274, 1278 (1981), as follows:

> Accepting a witness' statement that he is testifying from his own recollection requires the assumption that the witness is capable of making a determination that what he perceives as his recollection actually came from his prior observations as opposed to impressions planted in his memory through hypnosis. Such an assumption is contrary to the opinion held by many authorities that a witness will recall memories fabricated under hypnosis as his own recollection and will be unable to distinguish his true memories from pseudomemories implanted during hypnosis. . . .
>
> The faith which [certain] courts placed in the power of cross-examination also seems misplaced. One article claims that "[t]he subsequent opportunity for cross-examination at the trial is virtually ineffective as a means of assuring no false suggestions have been implanted."

The Florida court noted with apparent approval the Mena court, which adopted a per se rule of inadmissibility, held that the Confrontation Clause of the Sixth Amendment required the exclusion of hypnotically tainted testimony. 471 So. 2d at 14. The court further noted that the Arizona court later adopted an exception providing that "hypnosis does not render the witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." State ex rel. Collins v. Superior Court, 132 Ariz. 180, 209, 644 P.2d 1266, 1295 (1982).

The Florida Supreme Court also quoted the New Jersey Supreme Court in illustrating the danger that hynotized subjects will "fill in the gaps" of their memory:

> The hypnotic suggestion to relive a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated. * * * * Subjects will use prior information and cues in an inconsistent and unpredictable fashion; in some instances such information is incorporated in what is confabulated, while in others the hypnotic recall may be virtually unaffected.

471 So. 2d at 15, quoting State v. Hurd, 86 N.J. 525, 538-39, 432 A.2d 86, 92-93 (1981) (quoting Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical & Experimental Hypnosis 311, 317-18 (1979)).

In Hurd, the New Jersey Supreme Court concluded that a previously hypnotized witness could testify only if the proponent established admissibility by clear and convincing proof. Such proof was to include verification that the hypnosis session followed specified, stringent procedures designed to ensure that the "revived" memory was comparable in accuracy to normal recall. Id. at 16, quoting Hurd, 86 N.J. at 546-47, 432 A.2d at 95.

The Florida Supreme Court flatly rejected the Hurd court's conclusion that hypnotically-refreshed recollection could be admitted under certain circumstances. The court cited the Pennsylvannia Supreme Court's opinion that the Hurd court's rationale "does not do full justice to the fact that 'the

traditional guarantees of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process.'" 471 So. 2d at 16, quoting Commonwealth v. Nazarovitch, 496 Pa. 97, 109-11, 436 A.2d 170, 177-78 (1981). The Florida Supreme Court also cited with approval the following observation of the California Supreme Court as follows:

> [W]e observe that certain dangers of hypnosis are not even addressed by the Hurd requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility of the subject; none will directly avoid the additional risks, recognized elsewhere in Hurd, that the subject (1) will lose his critical judgment and begin to credit "memories" that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection.

471 So. 2d at 17, quoting People v. Shirley, 31 Cal. 3d 18, 39-40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, cert. denied, 459 U.S. 860 (1982).

Acknowledging and joining the trend of recent cases in other jurisdictions, the Florida Supreme Court ruled that hypnotically-enhanced testimony is per se inadmissible in future criminal trials. Noting that it "aptly describes our view on this issue," the court quoted the following statement by the Michigan Supreme Court:

> Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
>
> [U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of

> distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.

Id., quoting People v. Gonzales, 415 Mich. 615, 626-27, 329 N.W.2d 743, 748 (1982). "For these reasons," the Florida court explained, "we likewise hold that hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state, but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." 471 So. 2d at 18.

The Florida court then re-affirmed its prior decision in petitioner's appeal of his conviction for the Chi Omega murders (455 So. 2d 330, cert. denied, No. 85-6276 (May 5, 1986)). The court re-emphasized its opinion that the question of the admissibility of post-hypnotic testimony had not been before it in that case because "[t]he witness in the Chi Omega case repudiated any independent personal knowledge of the details elicited during the hypnotic trance and the trial judge was satisfied that her trial testimony was based on her own recollection unaffected by the hypnotic experiment." 471 So. 2d at 17.

According to the court, however, the present case presented a very different situation:

> In the present case we are faced with a witness whose memory has been "refreshed" or "enhanced" through state-sponsored hypnosis. Bundy's experts described the numerous inappropriate procedures and questions utilized by the social workers who administered the hypnosis to the witness, C.L. Anderson, in their attempts to enhance Anderson's recall through hypnosis. Both experts also gave their opinion that Anderson should never have been hypnotized in the first place because of the lapse of time between the event he was attempting to remember and the hypnotic episodes and because of all the information

> he had learned about the event during that intervening period of time. The expert's opinion was that Anderson's testimony was unreliable.

471 So. 2d at 17. The court nonetheless concluded that the admission of Clarence Anderson's testimony constituted "harmless constitutional error." Citing this Court's decisions in Schneble v. Florida, 405 U.S. 427 (1972), and Fahy v. Connecticut, 375 U.S. 85 (1963), the Florida Court described its analysis as follows:

> We must now determine whether, on the facts of this case, there was sufficient evidence, excluding the hypnotically recalled testimony, to uphold Bundy's conviction. The United States Supreme Court has articulated the harmless-constitutional-error rule to be a question of whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.
>
> The record shows that Mr. Anderson's testimony was refreshed under hypnosis as to only three details. Under hypnosis he was able to recall that the football jersey which the girl he described was wearing was blue and the numbers were "63" or "68". He was also able to remember that part of the man's attire was a pullover sweater and a shirt. After a thorough examination of the record before us in this case, we feel that sufficient evidence does exist, absent the tainted testimony, upon which the jury could have based its conviction of Bundy. There is no reasonable possibility that the tainted testimony complained of might have contributed to the conviction.

471 So. 2d at 19 (citations omitted).

Chief Justice Boyd wrote a separate concurrence in which he stated that he joined in the judgment only because "the eyewitness identification testimony, the crucial link in the chain of circumstantial evidence of appellant's guilt was, as the court finds, not substantially affected by the use of hypnosis". 471 So. 2d at 24. Chief Justice Boyd expressed his further

belief, however, that a substantial change in Mr. Anderson's testimony would have compelled a different result on appeal:

> When a person tried for and convicted of a crime challenges the conviction on appeal on the ground, properly raised at trial, that a crucial and prejudicial item of evidence against him was unreliable evidence and improperly admitted, and the appellate court rules that the evidence was indeed unreliable and prejudicial, then that appellant is entitled to the benefit of the ruling and should be given a new trial. This is so regardless of previous reliance on the old rule or previous ambiguity in the law. Therefore if we were faced with a situation where the crucial identification testimony was actually obtained through improper use of hypnosis, we would be required to reverse the conviction. To apply a new rule of inadmissibility of evidence in a criminal trial propectively only is highly improper.

471 So. 2d at 24.

Petitioner moved for rehearing and clarification of the opinion of the Florida Supreme Court, arguing that (1) the rule of inadmissibility adopted by the court compelled reversal of petitioner's conviction, even if the rule was not to be given general retroactive effect, (2) the court inaccurately concluded that Mr. Anderson's testimony was refreshed only as to the three details noted, (3) the court erred in concluding that the admission of the testimony constituted "harmless error", and in not specifying what remaining evidence was "sufficient", and (4) the court should not have presumed the content of any pre-hypnotic memory because the police did not preserve a record of Mr. Anderson's pre-hypnotic testimony. (A. 178). The court denied petitioner's motion without explanation.

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Denied Due Process Of Law, His Right To Trial By Jury, And His Right To Confront Witnesses When The Supreme Court of Florida Affirmed His Conviction And Sentence Of Death On The Basis Of Harmless Constitutional Error Despite Finding That The Hypnotically-Enhanced Testimony Of The State's Crucial Eyewitness Was Unreliable As A Matter Of Both Law And Fact.

In the opinion below, the Florida Supreme Court held that hypnotically-refreshed testimony is so unreliable and presents such barriers to cross-examination that it is inadmissible at trial as a matter of law. The court expressly rejected the possibility that hypnotic sessions could be designed adequately to safeguard against the dangers it posed. The only two exceptions to the court's rule of per se inadmissability are (1) facts demonstrably recalled prior to hypnosis and (2) corroborating evidence discovered as the result of the use of hypnosis for investigative purposes.

The court found as a matter of fact that the State's only alleged eyewitness in the case against petitioner had been subjected twice to improperly suggestive hypnosis by the State. The court also found that his testimony at trial was hypnotically-enhanced and thus per se unreliable as to (1) the blue color of the girl's football jersey, (2) the number "63" or "68" on the front of the jersey, and (3) the man's attire being a pullover sweater and a shirt. The court concluded, however, that the admission of the tainted testimony constituted harmless constitutional error. Without elaborating further, the court explained that "a thorough examination of the record" revealed that "sufficient evidence does exist, absent the tainted testimony, upon which a jury could have based its conviction of Bundy." 471 So. 2d at 19. According to the court, there was no "reasonable possibility that the tainted testimony complained of might have contributed to the conviction." Id.

Chief Justice Boyd characterized Mr. Anderson's testimony as "the crucial link in the chain of circumstantial evidence of appellant's guilt", but concurred in the judgment affirming petitioner's conviction on the ground that the testimony was not substantially affected by the use of hypnosis. Id. at 24-25.

The present petition arises because petitioner has been unconstitutionally convicted on the basis of evidence which the Supreme Court of Florida found unreliable both as a matter of fact and as a matter of law.

A. The Florida Supreme Court Misapplied this Court's Harmless Error Rule in Concluding that There Was No Reasonable Possibility that the Unreliable Testimony of Clarence Anderson Contributed to Petitioner's Conviction.

The court below correctly recognized that the proper question in harmless error analysis is whether there is a reasonable possibility that the inadmissable evidence contributed to the jury's decision to convict. See Schneble v. Florida, 405 U.S. 427, 432 (1972). The court's application of that standard, however, bears no resemblance to the analysis this Court or any other court.

In Schneble, this Court held that the improper admission of a codefendant's statement was harmless because, like the other evidence at trial, it tended merely to corroborate certain details of the defendant's properly admitted confession. The Court found that a rational jury certainly would have based its guilty verdict on the defendant's comprehensive and detailed confession, and "would not have found the State's case significantly less persuasive" had the co-defendant's statement been excluded. Id. at 431.

Similarly, in Harrington v. California, 395 U.S. 250 (1969), the Court found the improper admission of a codefendant's statement was harmless because the defendant's own testimony put him at the scene of the crime, as did two victims of the attempted robbery. Not only was the illegal evidence "cumulative", but the evidence tending to show guilt was "overwhelming." In short, "[t]he case against [the defendant] was not woven from circumstantial evidence." Id. at 254.

Most recently, in Skipper v. South Carolina, 54 U.S.L.W. 4403 (April 29, 1986), the Court held that the improper denial of a defendant's attempt to present the testimony of his jailer as to his good conduct was not harmless even though similar testimony had been admitted through testimony by the defendant and his former wife. The reasons for the Court's decision were (1) the subject matter of the jailer's testimony could not have been insignificant in light of the prosecutor's allegations that the defendant was likely to present a danger to fellow prisoners if sentenced to life in prison rather than to death, and (2) the testimony could not be characterized as cumulative because the jailer would likely be accorded more credibility on the subject than would the defendant or his wife. Id. at 4405.

In a case very similar to the case a bar, United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984), the Fifth Circuit ruled that the error of the district court below there admitting post-hypnotic identification testimony compelled reversal of the defendant's conviction for extortion even though the handwriting and palm print on the extortion note were identifed as belonging to the defendant. The court held that the risk to defendants' rights to due process and a fair trial presented by unduly suggestive hypnotic procedures, and the greater prejudicial than

probative effect of such procedures, "require the exclusion of an uncorroborated personal identification, made only after hypnosis, of a person clearly singled out for suspicion." Id., at 1203.5/ See also Holland v. Attorney General of New Jersey, 777 F.2d 150 (3d Cir. 1985) (although non-tainted evidence was sufficient to sustain the conviction, error was not harmless where tainted testimony unmistakably placed defendant at the scene of the crime, was not cumulative, and the remaining evidence was not overwhelming); Harris v. Wainwright, 760 F.2d 1148 (11th Cir. 1985) (where crux of State's case consisted of uncorroborated identification testimony, unconstftutionally admitted hearsay evidence connecting petitioner with the automobile involved in the crime was not harmless); Rose v. Engle, 722 F.2d 1277 (6th Cir. 1983) (where apart from defendant's improperly admitted statement there were no eyewitnesses to the shooting, error was not harmless).

In the present case, it cannot be denied that the testimony of Clarence Anderson was critical to conviction. Chief Justice Boyd described Mr. Anderson's testimony as "the crucial link in the chain of circumstantial evidence of appellant's guilt". Under a harmless-error standard that requires reversal of a conviction if a reasonable juror may have considered the improper evidence important, the opinion of a presumptively reasonable member of the court that the evidence was "crucial" should be conclusive. Even if such an unequivocal assessment were not conclusive, the unique and critical nature of Mr. Anderson's testimony is clear from the record and opinion below.

5/ The courts have often recognized that eyewitness testimony has an especially powerful effect on jurors and on the outcome of the trial. For a comprehensive discussion of the effect of eyewitness testimony, see Kampshoff v. Smith, 698 F.2d 581 (2d Cir. 1983).

The testimony of Clarence Anderson was not cumulative or corroborated or insignificant. No other alleged eyewitness testified. Mr. Anderson's testimony was the only evidence that placed petitioner with the victim at the time of the abduction. The only other evidence tending to associate petitioner with the victim at all -- the testimony of a fiber analyst that it was probable that fibers found in the University's van included some from the clothing (alleged to be a pullover and a shirt, and a football jersey and blue jeans) of both the petitioner and the victim -- was not likely to be nearly as persuasive. No statement of the defendant implied his involvement. No evidence was introduced corroborating any of Mr. Anderson's testimony except for his description of the petitioner and the victim. For example, no one other than Mr. Anderson testified as to the movements of Kimberly Leach after she left the classroom to retrieve her pocketbook that morning. No one other than Mr. Anderson testified as to having seen petitioner with the victim in the white van on the day she disappeared.6/

6/ It is significant that Mr. Anderson in his original statement to police and under hypnosis the first time placed his observation of the man and the girl -- whom he likened to a father and daughter -- in April, two months after the Leach girl's abduction. He also stated that he observed the man and the girl on his way home from work after the night shift. Following the first hypnosis session, the police indicated to Mr. Anderson that the abduction took place on February 9, and not in April. The police also discovered that Mr. Anderson had worked on February 9 and therefore his original statement of his movements on the morning that he allegedly saw the man and girl would have been inconsistent with verifiable facts.

Mr. Anderson then changed his story.

Even before the second hypnotic session, Mr. Anderson could not recall when he had seen the man and the girl but thought it was probably April. Under hypnosis for the second time, however, he placed the date precisely -- February 9 -- and changed his statement about his movements on that day consistent with the known fact that on the day of the abduction, Mr. Anderson was at work. Under hypnosis, he "recalled" that he had gone home that morning to change clothes and then returned to

[Footnote continued next page]

In contrast to the the Court's findings in Schneble and Harrington, the properly admitted inculpatory evidence in the present case was neither "overwhelming" nor so persuasive as to inevitably form the basis of the jury's decision. Fingerprint and hair samples taken from the van did not match those of the petitioner. Soil samples taken from the van did not match those from the crime scene. Is not likely that the jury relied primarily on the testimony of the fiber analyst to establish petitioner's guilt. The remaining evidence at trial went only toward establishing that petitioner was in Lake City at the time of the crime and was driving the stolen van around town; only Mr. Anderson's testimony placed the victim in the van. In other words, except for Mr. Anderson's testimony, the case against petitioner was not only "woven from circumstantial evidence," Harrington, 395 U.S. at 254, but it was a very loose weave.

It is apparent from the Florida court's treatment of the tainted testimony that, like Chief Justice Boyd, the entire court recognized that Mr. Anderson's testimony was crucial to the State's case. It would not have been necessary otherwise for the court to parse that testimony, excising only that portion the court had no choice but to concede was hypnotically-induced, determining that the remaining testimony constituted "sufficient evidence" to sustain petitioner's conviction. If Mr. Anderson's testimony was not crucial to the State's case, the court could

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[Footnote continued from preceding page]

work. At the end of the second hypnosis session, the hypnotist told Mr. Anderson that he would "remember all of the details that you discussed with me under hypnosis." (R. Vol. 146, A. 46).

Those were the details the police sought to solicit from the second hypnosis. And those were the details that convicted petitioner.

have removed the entire testimony from consideration rather than merely the "three details" added by the state's hypnotic sessions. Indeed, that is what harmless error analysis required. There is no authority in any decision of this Court that permits a court to cut out the bad portions of a witness's testimony -- to pretend that it did not exist -- and then conclude that there was enough good testimony left to convict the defendant. There is no principled way that such testimonial surgery can be performed consistently witn a defendant's right to a fair trial.

Given the undoubtable importance of Clarence Anderson's testimony, the question presented here is whether, in light of the other factual findings by the court as to the effect of hypnosis, the court could rationally determine that even though Mr. Anderson's testimony was altered by the two state-sponsored hypnosis sessions as to details that seemed to identify both the victim and petitioner that, a reasonable juror could not possibly have found the State's case less persuasive had the "details" been excluded from Mr. Anderson's testimony.

B. The Court Below Arbitrarily and Capriciously Determined that Mr. Anderson's Testimony was Altered by the Two State-Sponsored Hypnosis Sessions "Only" as to the Color of the Victim's Jersey, the Number on the Jersey, and the Attire of the Perpetrator.

The court provided no explanation for its decision other than its conclusory statement that "sufficient evidence does exist, absent the tainted testimony, upon which the jury could have based its conviction of Bundy," and its terse holding that "[t]here is no reasonable possibility that the tainted testimony complained of might of contributed to the conviction." 471 So. 2d at 19.

1. The Court Below Improperly Applied a "Sufficiency of the Evidence" Standard of Review for Harmless Error.

To the extent that the court's explanation reflects its analysis, the court is clearly wrong. This Court established in Fahy v. Connecticut, 375 U.S. 85, 86 (1963), that the question of harmless error is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of". Whereas "sufficiency of the evidence" is the standard appropriate to determining whether the jury could properly find the defendant guilty beyond a reasonable doubt based on all the available evidence at trial, where the reviewing court determines that some of the evidence was improperly admitted the standard is whether there is "no reasonable possibility that the improperly admitted evidence contributed to the conviction." Schneble v. Florida, 405 U.S. 427, 432 (1972).

The distinction is particularly important where, as here, the court found that the improperly admitted evidence was unreliable and resistant to cross-examination due to state-sponsored hypnotism. This is not a case where the evidence was deemed improper because it was wrongfully obtained in violation of an independent constitutional right. The illegal evidence in the present case directly impaired the fact-finding process of the trial. Its admission casts grave doubts on the fairness and accuracy of petitioner's trial.

2. The Determination of the Court Below that Mr. Anderson's Recall was Affected Only to the Extent of Three Details is Inconsistent with the Court's Own Findings on the Effects of Hypnotism.

The specific dangers of hypnosis recognized by the court precluded its subsequent determination that the two

successful hypnotic sessions conducted by the State affected Mr. Anderson's testimony only to the extent of adding three extra details.

Following the undeniable trend of recent cases, e.g., State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981), Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982), People v. Gonzales, 415 Mich. 615, 329 N.W. 2d 743 (1982), the Florida Supreme Court concluded that hypnotically-enhanced testimony is so unreliable and resistant to cross-examination as to be per se inadmissable at criminal trials. The dangers of hypnosis recognized by the court included (1) that the witness is unable to determine whether he is testifying from his own memory or from memories fabricated during hypnosis, 471 So. 2d at 14, (2) that cross-examination is an ineffective means of determining the effects of hypnosis, id., (3) that hypnotized subjects will fill in details with other memories, fantasies, or prior information, id. at 15, (4) the jury's ability to view the demeanor of the witness is ineffective in revealing the trustworthiness of a hypnotized witness, id. at 16, (5) the witness will lose his critical judgment and begin to credit memories that were formerly viewed as unreliable, id. at 17, and (6) the witness will exhibit unwarranted confidence in the validity of his recollection, id. The court also found that hypnosis has not received general acceptance in the scientific community as a method of acheiving accurate recall, id.

Despite these findings as to the hidden and uncorrectable dangers of hypnosis, the Florida Supreme Court determined that Mr. Anderson's testimony was affected only as to three details. Even then, it ignored (1) the acknowledgment of the hypnotists themselves that Mr. Anderson recalled other

details during hypnosis, (2) the additional charges in testimony noted by the defense experts and unrefuted in the record, and (3) the even greater number of details learned under hypnosis obvious from a simple comparison of the statements of Clarence Anderson before, during, and after hypnosis.

Mr. Anderson did not limit his testimony at trial to those facts he was able to recall at the time of his initial statement to the police. Neither did the court below, in determining the extent to which Mr. Anderson was competent to testify at trial, limit the legally effective scope of his testimony to those facts. Instead, after petitioner's conviction and sentencing, the court on review excised from the single eyewitness's testimony only specific facts the court found were hypnotically-induced. Thus, instead of applying its own rule that a hypnotized witness is competent to testify only to "those facts demonstrably recalled prior to hypnosis," the court accorded all of Mr. Anderson's testimony legal effect except for those facts apparently added by hypnosis.

The source for the court's conclusion that Mr. Anderson's testimony was hypnotically-refreshed as to only three details apparently was Mr. Anderson himself. Only Mr. Anderson stated, at one point in his testimony, that his hypnotically-induced testimony was limited to the three items recognized by the court.7/ This is plainly contrary to the court's recognition that a hypnotized witness is unable to separate real memories from confabulated ones, and also gains greater confidence in his ability to recall his "own" memories. It also ignores the fact that the hypnotist, Mr. Burnette, stated that

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7/ Mr. Anderson also testified at trial that he had recalled during hypnosis that the van bore a green and white Florida license plate.

the one purpose and effect of the second hypnosis session was to elicit the date of the abduction, and that Mr. Anderson stated before the session that he still did not remember the date. Yet, at trial, Mr. Anderson testified that he had learned the date before the session. Obviously, if Mr. Anderson had not recalled that he saw the man and the girl on February 9 -- instead of April as he originally recalled, even under hypnosis -- he would not have been a witness at petitioner's trial.

The court's conclusion also ignores the statements of the state's hypnotists themselves as to the nature of the facts Mr. Anderson recalled during hypnotism. The hypnotists explained that the second hypnotic session produced more detailed statements in general than Mr. Anderson had recalled before, and specifically elicted (1) a more complete description of the appearance as well as the clothing of both the man and the girl, (2) the date of the abduction as Feburary 9 rather than in April, and (3) a description of the license plate. (R. 7871, 8141).

The court's conclusion that only the "three details" were added during hypnosis also ignored the descriptions by the defense experts, whose testimony was not only unrefuted but cited with approval by the court as to the suggestibility of the procedures used. Dr. Kuypers testified at the supression hearing to the following changes elicited during the hypnosis sessions: (1) the date of the occurrence, (2) the descriptions of Anderson's activities both before and after the occurrence, (3) the numbers on the jersey, (4) the man's approximate weight, (5) the fact that the man was clean shaven, (6) the change in the description of the man's clothing from a light shirt or jacket to a white pullover with a shirt underneath, (7) the change in the description of the van from covered rear windows to windows Anderson

could see through, (8) the change in Anderson's ability to see the man and girl from the rear of the van, and (9) that the girl was crying. (R. 10955).

Finally, a simple comparison of the statements given by Mr. Anderson reveals even more changes in his description and a wide disparity in the volume of information provided. Such a comparison is not only appropriate, but necessary under the Arizona standard adopted by the Florida Supreme Court: "hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." 471 So. 2d at 18. For the convenience of the Court, this petition includes a chart summarizing the recorded statements made by Clarence Anderson (1) on July 28, 1978, prior to being hypnotized, (2) later the same day, during the first hypnotic session, (3) on July 31, 1978, during the second hypnotic session, and (4) at petitioner's trial. Table 1.

It can be seen from the chart that, in addition to the changes already noted, Mr. Anderson's post-hypnotic statements added (1) the man's age, (2) the fact that the man was "good-looking", (3) the girl's height, (4) that the girl was "slim", (5) that Mr. Anderson noted at the time of the observation that the girl looked very much like his niece, (6) that, after the van drove off, Mr. Anderson could see through the rear windows of the van that the man was "scolding" the girl, (7) a view of the man leading the girl up to the sidewalk on the street opposite the van, (8) that the girl wore a "football jersey" and blue pants, (9) the red-orange color of the numbers on the jersey, and (10) the dark color of the object the girl carried. Table 1.

TABLE I

STATEMENTS OF CLARENCE ANDERSON

	Prior to Hypnosis	First Hypnotic Session	Second Hypnotic Session	Trial Testimony
Date of Observed Event	maybe April	some day in April	February 9, because he worked that day and it was the day after his daughter's birthday	February 9, because it was the day after his daughter's birthday
Anderson's Activities Before Observed Event	no statement	no statement	drank coffee, checked on drug cabinet at work, asked for time to run home to shower and change clothes, checked that his replacement was available	received several calls the night before to work overtime, and finally went in because of a trip to Gainesville; missed his daughter's birthday party
Anderson's Activities After Observed Event	home from work	home from work, took shower, went to bed, slept until noon	went home from work, asked wife to iron shirt, took shower, ate daughter's birthday cake	went home from work, asked wife to iron shirt, probably ate birthday cake

TABLE I (continued)

	Prior to Hypnosis	First Hypnotic Session	Second Hypnotic Session	Trial Testimony
Description of Man	medium build, 5'7" to 5'10", medium or darker brown wavy hair	medium build, 5'7" to 5'10", medium or darker brown wavy hair	medium build, 5'7" to 5'10", medium or darker brown wavy hair, "fairly young, 29, 30 31," good-looking, 160-165 pounds	light to dark brown hair, full and wavy; early thirties; positive in-court identification of petitioner as the man
Description of Girl	12 or 13 years old, shoulder-length brown hair parted in the middle	12 or 13 or 14 years; 5'5", 5'6" or maybe not that tall; shoulder-length black hair parted in the middle; slim	no statement	12 or 13 years old; shoulder-length dark hair parted in middle; looked very much like Anderson's niece; positive in-court identification of photograph of victim as the girl
Man's Conduct	led girl around front of van by the elbow and helped her in	led girl to van and helped her in	after van drove off, man turned to girl and scolded her	man led girl six to ten feet to sidewalk, stopped for a car in the road, then crossed the street to the van; man had scowl on face, looked like a father taking a child home for a spanking

TABLE I (continued)

	Prior to Hypnosis	First Hypnotic Session	Second Hypnotic Session	Trial Testimony
Girl's Expression	unhappy look as if in trouble at school	first says he cannot see her face, then is put under a deeper trance and says "she's crying"	no statement	"either crying or had been crying"
Description of Girl's Clothing	dungarees or slacks, "dark pullover"	"bluish" pants, possibly dungarees; blue pullover without designs on it	blue "football jersey" with "3" and either "6" or "8" on it	dark blue "pullover football jersey with the numbers "63" or "68" in red-orange; "probably dungarees"
Description of What Girl Carried	sweater or jacket or large pocketbook	rolled up jacket or a medium-sized handbag; dark blue or black or dark brown	dark brown pocketbook	medium-sized object that could be pocket-book or rolled up jacket or both, probably a purse

TABLE I (continued)

	Prior to Hypnosis	First Hypnotic Session	Second Hypnotic Session	Trial Testimony
Description of Man's Clothing	light shirt or jacket	light shirt or jacket	white jacket or white pullover with a shirt underneath	pullover sweater with a shirt underneath the sweater; sweater was "neutral color, tan, light gray, something like that
Description of Van and Anderson's Ability to See Through Rear Windows of Van	white van, rear windows covered; could not see man after he entered van	white van; green and white Florida license plate [did not match color of plate on stolen van]	white Chevrolet van; clear rear windows through which Anderson could see the man scold the girl	clear rear windows through which Anderson could see a silhouette of man turned toward passenger side of van

3. The Court Improperly Determined that there Was No Possibility that the Unreliable, Hypnotically-Induced "Three Details" in Mr. Anderson's Testimony Could Have Influenced a Reasonable Juror

A witness's testimony, especially a hypnotized witness's testimony, properly cannot be parsed into admissable and inadmissable portions for the purpose of harmless error analysis. Petitioner is unaware of any other case in which a court has done so. Petitioner contends that, as a matter of law, it cannot be said with certainty which portions of a witness's testimony significantly contributed to his or her credibility in the eyes of a reasonable juror. Furthermore, where, as here, the witness is an alleged eyewitness to the crime and the inadmissable portions of the testimony concern identifying details, it should be presumed as a matter of law that a reasonable juror may have credited the witness's testimony only because of the intimate level of detail he recalled.

Parsing the testimony of an eyewitness, as the Florida Supreme Court did, and excising only the tainted testimony in assessing the weight of the remaining evidence, also denies the defendant the right to effective cross-examination and impeachment of the witness. In the present case, for example, if the tainted testimony had been excluded from trial, defense counsel may have been able to demonstrate to the jury that Mr. Anderson had no recall of the man's attire and the color and markings on the girl's jersey. Defense counsel thus would have had an opportunity to cast doubt on Mr. Anderson's positive identification of the man and girl as being petitioner and the victim, as well as challenging the fact of his observation. As the State itself recognized, "the credibility of Andy Anderson is very much the crux of the defense's case". (R. 6507).

Even if the remaining testimony were allowed to stand, the court below failed to analyze the possible prejudicial effect of the concededly unreliable "three details" in Mr. Anderson's testimony. Contrary to the impression left by the court's treatment of this issue, neither the mere number of changes nor the fact that they were "details" dispose of the question of their effect on the jury.

First, the added details did not relate merely to incidental recollections by Mr. Anderson, such as the weather on the day of the observation or the colors of the three cars between his own and the van. Rather, they bore directly on the description and identification of both the petitioner and the victim.

Second, the three hypnotically-induced details recognized by the court as unreliable were not merely cumulative of an otherwise comprehensive identification of the man and girl observed. The remainder of the description provided by Mr. Anderson was that the man was around 30 years old and had wavy brown hair, and that the girl was around 13 years old, carried a sweater or jacket or pocket book, wore a pullover and probably dunagrees, and had brown hair parted in the middle. Without the details as to the color and markings of the jersey and the man's attire, Mr. Anderson's description would be entirely consistent with his initial impression, i.e., that what he had observed was an unnoteworthy incident of a father picking up an errant daughter at the Junior High School.

Third, as previously discussed, it reasonably may be presumed that the greater the level of detail provided by a witness, the greater his or her credibility with the jury. This can be further presumed to be particularly true in the case of details bearing directly on identification.

That the "details" elicited during hypnosis were critical to the State's case is made clear by the fact that Mr. Anderson was hypnotized at all. At the time that Mr. Anderson came forward, petitioner had been in custody for over five months, the body of the victim long before had been recovered, and indictments had been issued against petitioner in both the Lake City and Chi Omega cases. The hypnotism of Mr. Anderson served no investigative purpose. The only conceivable purpose the State could have had in twice hypnotizing Mr. Anderson was to improve his testimony for presentation at trial. The only conceivable reason for the extraordinary efforts to improve Mr. Anderson's trial testimony was that the State believed his testimony was necessary in the case against petitioner.

In sum, all the added details resulting from hypnosis, from those three recognized by the court to the numerous others noted by the defense experts or obvious from the record itself, made it apparently more likely that the persons observed were petitioner and Kimberly Leach rather than -- as Mr. Anderson himself first believed -- just a father picking up an errant daughter at school. Those same details also are likely to have contributed to Mr. Anderson's overall credibility by increasing the apparent likelihood that he had indeed observed the event. Finally, as the court itself fully recognized a witness from whom extra detail is elicted during hypnosis is likely to have greater confidence in his testimony. Such confidence not only render the witness more resistant to cross-examination, but potentially heighten his credibility with the jurors.

The added detail also included some likely to inflame the jury and prejudice the defendant. These include the description of the girl as "crying", and of the man as "scolding" her.

Mr. Anderson worked next door to the Lake City Police Department and was aware of the extraordinary efforts being made to find Kimberly Leach. He was also aware of the tremedous publicity concerning the investigation of petitioner and identifying petitioner as the prime suspect in the case. As result of this publicity, Mr. Anderson had been exposed to news pictures of both petitioner and the victim. Despite this, Mr. Anderson was so unsure of his ability to identify either the victim or the petitioner that he refrained from speaking to the police for fear of triggering a "wild goose chase". (R. 4132, A. 129). The added details and the fact that they, including the date of the crime, were validated and strengthened by hypnosis, clearly increased Mr. Anderson's confidence in his recall. This effect not only increased the likelihood that Mr. Anderson's recall, whether or not accurate, nevertheless was credible, it also made him unnaturally resistant to cross-examination because he was not aware of the inaccuracies himself.

These are not suppositions, they are findings of the court below. After undergoing two state sponsored hypnosis sessions, complete with a homework assignment in between, Mr. Anderson could positively identify both the victim and the petitioner without hesitation.

CONCLUSION

For the reasons delineated above, this petition for certiorari should be granted.

Respectfully submitted,

James E. Coleman, Jr.,
Polly J. Nelson,
Wilmer, Cutler & Pickering
1666 K Street N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel For Petitioner

May 21, 1986

APPENDIX

Theodore Robert BUNDY, Appellant,

v.

STATE of Florida, Appellee.

No. 59128.

Supreme Court of Florida.

May 9, 1985.

Rehearing Denied July 11, 1985.

Defendant was convicted in the Circuit Court, Columbia County, Wallace M. Jopling, J., of kidnapping and of first-degree murder, and he appealed. The Supreme Court, Adkins, J., held that: (1) testimony of a witness as to his having seen victim with defendant on date in question was not admissible when it had been refreshed through hypnosis, but since testimony was refreshed as to only three details in whole of witness' identification, and sufficient evidence existed, absent his testimony, to provide jury with a basis for convicting defendant, admission of posthypnotic testimony was harmless on ground that there was no reasonable possibility that testimony might have contributed to conviction, and (2) aggravating circumstance that crime was especially heinous, atrocious or cruel was not established under evidence, but aggravating circumstances that the crime was committed while the defendant was under sentence of imprisonment and that defendant was previously convicted of another capital felony were established and, in absence of any mitigating circumstances, justified imposition of the death penalty.

Affirmed.

Boyd, C.J., concurred specially and filed an opinion.

1. Witnesses ⇐257.10

Testimony which has been hypnotically refreshed is per se inadmissible in a criminal trial due to its basic unreliability, but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis.

2. Courts ⇐100(1)

A decision as to whether a new standard set forth in a case should be applied retrospectively or prospectively includes a consideration of the process to be served by the new standard, the extent of the reliance by law enforcement authorities on the old standard, and the effect on the administration of justice of a retroactive application of the new standard.

3. Courts ⇐100(1)

Decision to exclude from a criminal trial posthypnotic testimony because of its basic unreliability should be prospectively applied.

4. Courts ⇐100(1)

Any posthypnotic testimony is inadmissible in a criminal trial if hypnotic session took place after date of decision to exclude such testimony.

5. Courts ⇐100(1)

Any conviction presently in the appeals process in which there was hypnotically refreshed testimony need not be overturned, but need only be examined on a case by case basis to determine if there was sufficient evidence excluding the tainted testimony, to uphold the conviction.

6. Witnesses ⇐257.10

A previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensively or understand his duty to tell the truth on his abilities to perceive and to remember and, other than the new matter discovered at the hypnotic session, may properly testify to all events.

7. Criminal Law ⇐1224(1)

The continued use of hypnosis by the police for purely investigative purposes need not be foreclosed by the rule against admission of posthypnotic testimony.

8. Criminal Law ⇐388

Any corroborating evidence obtained through the use of hypnosis by the police for purely investigative purposes is admissible in a criminal trial subject to applicable evidentiary objections.

A1

9. Criminal Law ⇐1169.1(7)

Admission of hypnotically recalled testimony is not a basis for reversal under the harmless-error rule unless there is a reasonable possibility that the testimony might have contributed to the conviction.

10. Criminal Law ⇐1169.1(7)
Witnesses ⇐257.10

Testimony of a witness as to his having seen victim with defendant on date in question was not admissible when it had been refreshed through hypnosis, but since testimony was refreshed as to only three details in whole of witness' identification, and sufficient evidence existed, absent his testimony, to provide jury with a basis for convicting defendant, admission of posthypnotic testimony was harmless on ground that there was no reasonable possibility that testimony might have contributed to conviction.

11. Criminal Law ⇐1035(6)

Issue as to whether trial court erred in excusing those jurors who were unalterably committed to vote against death penalty was not subject to being considered on appeal when issue was never raised in trial court.

12. Criminal Law ⇐633(1)

Mere existence of extensive pretrial publicity is not enough to raise presumption of unfairness of a constitutional magnitude. U.S.C.A. Const.Amends. 1, 5, 6.

13. Criminal Law ⇐1144.8

Mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut presumption of a prospective jurors' impartiality and, as long as juror can lay aside his opinion or impression and render a verdict based on evidence presented in court, presumption remains. U.S.C.A. Const.Amends. 1, 5, 6.

14. Criminal Law ⇐1144.8

Presumption of prospective jurors' impartiality was not rebutted, thus warranting denial of motion for change of venue or abatement of prosecution, even though only three of the 12 jurors had no knowledge of other murders of which defendant was accused, where five of remaining jurors have no more than sketchy ideas of other murders, and of four remaining juror's, all stated that they would put aside any opinion they might hold and decide case only on evidence presented. U.S.C.A. Const.Amends. 1, 5, 6.

15. Criminal Law ⇐1036.1(7)

Consideration of whether trial court erred in failing to hold a *Frye* inquiry on its own motion concerning admissibility of the fiber and shoe track evidence was an issue which was procedurally barred where defendant failed to make an objection and failed to demonstrate any fundamental error.

16. Criminal Law ⇐651(1)

Denial of defendant's motion for a view of the crime site was not an abuse of discretion, notwithstanding claim that witness' recall of the abduction of the victim would have been inconceivable had a view of the site been granted, where defendant had substantial opportunity, which he exercised, to cross-examine witness; moreover, the view had substantially changed from the time of the victim's disappearance to the time of the trial due to a road-widening project.

17. Criminal Law ⇐351(3)

Two incidents of flight were properly admitted as relevant evidence which a jury could use as circumstantial evidence of guilt and were a proper basis upon which to instruct on flight; when defendant was apprehended after fleeing from officer who had stopped him, it was only six days after victim had disappeared, and since disappearance had attracted much publicity, it was reasonable to infer that defendant fled from officer as a result of consciousness of guilt on his part.

18. Criminal Law ⇐1208.1(5)

The word "heinous" employed as an aggravating circumstance in section 921.-141(5)(h) justifying a sentence of death means extremely wicked or shockingly evil, whereas the word "atrocious" means outrageously wicked and vile, and "cruel"

#2

means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. West's F.S.A. § 921.141(5)(h).

See publication Words and Phrases for other judicial constructions and definitions.

19. Homicide ⇐354

A finding that the aggravating circumstance of heinous, atrocious, or cruel existed to justify the death penalty under § 921.141(5)(h) was not warranted where there was no clear evidence offered to show that the victim struggled with their abductor, experienced extreme fear and apprehension, or was sexually assaulted before her death. West's F.S.A. § 921.141(5)(h).

20. Criminal Law ⇐29

The same acts violate two penal statutes only if each statutory provision requires proof of a fact that the other does not.

21. Criminal Law ⇐1208.6(4)

Subsections 921.141(5)(a) and 921.141(5)(b) outlining aggravating circumstances to be found as justification for imposition of the death penalty, that the crime was committed when defendant was under a sentence of imprisonment and that the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence, each required proof of a fact that the other did not and, hence, could be used as establishing two aggravating circumstances and, when so used, did not constitute an impermissible doubling of aggravating circumstances in imposing the death penalty. West's F.S.A. § 921.141(5)(a, b).

22. Criminal Law ⇐1208.6(5)

Testimony of an investigator from district attorney's office in Colorado was admissible in homicide prosecution to prove that defendant had escaped from jail in Colorado and, hence, as establishing an aggravating circumstance that the crime in question was committed while the defendant was under sentence of imprisonment. West's F.S.A. § 921.141(5)(a, b).

J. Victor Africano and Paul E. Risner, Live Oak, for appellant.

Jim Smith, Attorney General and Gregory C. Smith, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal by Theodore Robert Bundy from his conviction of first-degree murder and from the trial judge's imposition of the death sentence after the jury had recommended death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

On February 9, 1978, Kimberly Leach, age 12, was reported missing from her junior high school in Lake City, Florida. Two months later, after a large scale search, the Leach girl's partially decomposed body was located in a wooded area near the Suwanee River, Suwanee County, Florida.

On July 21, 1978, Bundy was indicted for the murder and kidnapping of Kimberly Leach. Trial was set in Suwanee County, Florida. Thereafter, Bundy moved for change of venue or, in the alternative, for abatement of prosecution. The motion for abatement of prosecution was denied. However, the requested venue change was granted and the case transferred to the circuit court in Orange County, Orlando, Florida. There Bundy was convicted of kidnapping and first-degree murder. The jury recommended death. Bundy was subsequently sentenced to a term of life imprisonment for the kidnapping conviction and death for the murder.

The events and evidence leading to the investigation, trial, and conviction of Bundy are as follows: On February 15, 1978, Bundy was arrested in Pensacola, Florida, after fleeing from a stop made by an officer whose suspicions had been aroused. At that time Bundy identified himself to the officer as one Kenneth Misner. Over the next several days Bundy was extensively interviewed by officers from the Pensacola and Tallahassee Police Departments and the Leon County Sheriff's Office. During

A3

this time he revealed his true identity. It was learned that Bundy was wanted for escape and homicide in Colorado and was a suspect in thirty-six sex-related murders in the northwest United States. During these interviews and thereafter, Bundy also became the prime suspect in the January 1978 murders of the Chi Omega Sorority members in Tallahassee. Later Bundy was indicted, convicted, and sentenced to death for the Chi Omega murders. We affirmed his convictions and sentences. *Bundy v. State*, 455 So.2d 330 (Fla.1984), herein called *Bundy v. State I*.

Following Bundy's arrest in Pensacola, Detective Parmenter of the Jacksonville Police Department reported to Leon County authorities that on February 8, 1978, his fourteen-year-old daughter had been approached in a shopping center parking lot in Jacksonville by a man driving a white van. The man had fled when the girl's brother arrived. The teenagers were able to record the license tag numbers on the van. The tag had been reported stolen from a Tallahassee residence near the Chi Omega Sorority house on January 13, 1978.

At the suggestion of Leon County authorities, Detective Parmenter agreed to have his children hypnotized. After the hypnotic session, each child was asked to separately make a police composite of the man they had seen on February 8, 1978. These composites were introduced into evidence at trial. Later, during a photo review conducted by the Leon County Sheriff's Department, both Parmenter children picked out the picture of Bundy as the man they confronted on February 8, 1978, with the white van.

On February 11, 1978, Officer Dawes of the Leon County Sheriff's Department was patrolling in an unmarked car in an area of Tallahassee. He observed a man, whom he identified at the trial as Bundy, locking or unlocking a car door. Dawes asked the man for identification and the man replied he had none. Dawes then shined his flashlight into the car and spotted a license tag on the floorboard. The tag number matched the one which had been reported by the Parmenter children. When Dawes went to his car to run a radio check on the tag, the man fled.

Richard Shook, the manager at the Florida State University Media Center, testified at trial that in early February of 1978 a van belonging to the Center disappeared. The van was discovered several days later, taken into custody, and processed for physical evidence. Fingerprints and hair sample comparisons taken could not be linked to Bundy or the victim. Soil samples taken from the van were different from the soil samples taken from the crime scene. Blood stains on the van's carpet were found to be group B blood. The Leach girl had that type as does over fifteen percent of the human population. In addition, analyst Mary Hinson testified that it was extremely probable that both Bundy's and Leach's clothing had come in contact with the van's carpet and that the clothing of each had probably come into contact with each other.

The state offered the testimony of two Lake City Holiday Inn employees and the state's handwriting expert, John McCarthy. These witnesses established that Bundy had registered at the Lake City Holiday Inn on February 8, 1978, under another name.

Prior to Bundy's indictment on July 21, 1978, for the Leach murder and kidnapping, only one witness placed Bundy and the white van at the scene of the Lake City Junior High School on the morning of February 9, 1978. Chuck Edenfield, a school crossing guard at the junior high school, testified that he saw a man whom he identified as Bundy driving a white van in front of the school.

The state's one eyewitness to the abduction of Kimberly Leach was Clarence Anderson. On July 18, 1978, Anderson reported to the Lake City Police Department that the profile of a person he had seen on a television newscast bore a striking resemblance to the man that he had observed with a girl near the Lake City Junior High School several months earlier. Assistant State Attorney Dekle asked Anderson to

A4

undergo hypnosis to refresh his memory. Anderson agreed and was hypnotized twice. Thereafter, he stated that on February 9, 1978, he noticed a man leading a young girl into a white van near the Lake City Junior High School. Anderson identified the young girl as Kimberly Leach and the man in the van as Theodore Bundy.

As his first point on appeal Bundy argues that the trial judge erred in denying Bundy's several motions to suppress the testimony of certain witnesses whose recall had been affected or altered by hypnosis. The defense contended that due to the lapse of time between the disappearance of the Leach girl and the revelation of Anderson almost six months later, the massive amount of information about the events that Anderson had ingested during that period of time, and the blatant misuse of hypnosis by those who had facilitated the sessions, a substantial likelihood of an irreparable in-court misidentification of Bundy by Anderson would occur. In his argument before the trial court, Bundy relied on the case of *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). In *Neil v. Biggers* the United States Supreme Court outlined the factors to be considered by the trial court in determining whether an identification was reliable even though the confrontation procedure was suggestive. The Court stated:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199–200, 93 S.Ct. at 382.

At the time of the suppression hearing in this case, the greater weight of legal authority was that the hypnotizing of a witness went to the credibility of the witness and not to the admissibility of his testimony, but, a number of jurisdictions have recently looked at the use and misuse of hypnosis in the forensic setting and altered this view. In *State v. Mack*, 292 N.W.2d 764 (Minn.1980), the Minnesota Supreme Court addressed the issue of the use of hypnotically refreshed testimony as one of first impression. The question certified to the *Mack* court was whether a previously hypnotized witness may testify in a criminal proceeding concerning the subject matter addressed at the pretrial hypnotic interview. The record before the *Mack* court contained the opinion of no less than five experts in hypnosis and memory retrieval. The court elected to view the issue as going to the admissibility of the witness' testimony and not its credibility. The court adopted the proposition advanced by the defense that the doubtful reliability of hypnosis prompted recollection raised an admissibility question which should be governed by the standards announced by the District of Columbia Circuit Court of Appeal in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). Under *Frye* the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate.

In *Bundy v. State I*, we discussed the *Frye* test of general scientific acceptance. We noted that recent judicial treatment of hypnosis in connection with the presentation of eyewitness testimony in court reveals a growing recognition that hypnosis is not widely accepted by psychiatrists and psychologists as a consistently reliable method of refreshing or enhancing a person's memory of past perceptions and experiences. Some jurisdictions have held that the testimony of witnesses who have undergone hypnotic memory enhancement is inadmissible *per se*, either because the technique has not been established as reliable under *Frye* or because the scientifically recognized danger of unreliability of such testimony outweighs its probative value as a matter of law, or for a combination of such reasons. *See, e.g., People v. Shirley*, 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 458 U.S. 1125, 103

A5

S.Ct. 13, 73 L.Ed.2d 1400 (1982); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982). We believe a discussion of the rationale underlying some of these particular decisions is warranted.

In early 1981, the Arizona Supreme Court handed down its decision in *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). The court addressed the rationale of *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969), which was the earliest case deciding the issue of admissibility of testimony offered by witnesses who have undergone hypnosis in an attempt to increase their memories concerning events about which they may testify. The *Mena* court viewed the *Harding* court's handling of the issue as cursory. The *Mena* court stated:

> None of the early cases following *Harding* which approved the admission of testimony from previously hypnotized witnesses contain any analysis of the effects of hypnosis or even acknowledge its power to distort memory....
>
> Accepting a witness' statement that he is testifying from his own recollection requires the assumption that the witness is capable of making a determination that what he perceives as his recollection actually came from his prior observations as opposed to impressions planted in his memory through hypnosis. Such an assumption is contrary to the opinion held by many authorities that a witness will recall memories fabricated under hypnosis as his own recollection and will be unable to distinguish his true memories from pseudomemories implanted during hypnosis....
>
> The faith which the above courts placed in the power of cross-examination also seems misplaced. One article claims that "[t]he subsequent opportunity for cross-examination at the trial is virtually ineffective as a means of assuring no false suggestions have been implanted."

128 Ariz. at 230, 624 P.2d at 1278 (citations omitted). The Court of Special Appeals of Maryland in *Collins v. State*, 52 Md.App. 186, 447 A.2d 1272 (1982), has since overruled *Harding* and held that the use of hypnosis to restore or refresh the memory of a witness was not shown to be accepted as reliable by the relevant scientific community, and thus such testimony was inadmissible.

In adopting an inadmissible per se rule the *Mena* court noted:

> The determination of the guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases.

Id. at 231, 624 P.2d at 1279. The court also found that the confrontation clause of the sixth amendment of our Federal Constitution required the exclusion of hypnotically tainted testimony. *Id.* at 232, 624 P.2d at 1280.

The Arizona Supreme Court again addressed the issue in *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982). In its original opinion the *Collins* court reaffirmed its decision in *Mena*. In a supplemental opinion the court modified its original inadmissible *per se* rule and added the exception that "hypnosis does not render the witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." *Id.* at 209, 644 P.2d at 1295. The *Collins* opinion contains most of the relevant excerpts from the scientific community on this subject. These authorities reveal that hypnosis subjects are often so susceptible to suggestion and receptive to the hypnotist's verbal and nonverbal communications that they may respond in accordance with what he or she perceives the desired response to be in order to please the hypnotist. This may even occur in response to implicit stimuli unin-

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tentionally emanated from the hypnotist. Another phenomenon which often occurs is the willingness of subjects to confabulate, or "fill in the gaps" in their memories. The following illustrates this situation:

> The hypnotic suggestion to relive a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated.... Subjects will use prior information and cues in an inconsistent and unpredictable fashion; in some instances such information is incorporated in what is confabulated, while in others the hypnotic recall may be virtually unaffected.

State v. Hurd, 86 N.J. 525, 538–539, 432 A.2d 86, 92–93 (1981) (quoting Orne, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311, 317–318 (Oct. 1979)).

Courts have expressed concern that the recall induced by hypnosis may be totally incorrect, *State v. Grier*, 129 Ariz. 279, 630 P.2d 575, 578 (App.1981), and that the subject can willfully lie. *Hurd*, 86 N.J. at 538, 432 A.2d at 92. In addition, there is the concern that hypnosis is often thought by lay persons to be a magical thing which can produce fantastic recall and startling results. *Collins*, 132 Ariz. at 186, 644 P.2d at 1272. A greater concern is that the jury is likely to place undue emphasis on what transpired during a hypnotic session. Diloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.U.L.Rev. 1, 2 (1977).

The courts of some jurisdictions have held that hypnotically aided testimony is admissible if certain strict safeguards in procedure are followed which are supposed to minimize the recognized danger of unreliability. *See, e.g., Hurd; Polk v. State*, 48 Md.App. 382, 427 A.2d 1041 (1981). In *Hurd*, the Supreme Court of New Jersey rejected the rigid *Frye* rule adopted in *Mack* and *Mena*. The court found that "the purpose of using hypnosis is not to obtain truth, as a polygraph or 'truth serum' is supposed to do". 86 N.J. at 537, 432 A.2d at 92. It recognized that hypnosis can legitimately be employed as a means of overcoming amnesia and restoring the memory of a witness. The *Hurd* court stated:

> In light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate. Based on the evidence submitted at trial, we are satisfied that the use of hypnosis to refresh memory satisfies the *Frye* standard in certain instances. If it is conducted properly and used only in appropriate cases, hypnosis is generally accepted as a reasonably reliable method of restoring a person's memory.

Id. at 537–38, 432 A.2d at 92.

Having determined that the use of hypnosis to aid a witness met the *Frye* rule in certain instances, the *Hurd* court went on to quote elaborately from the testimony of Dr. Orne, one of the defense's experts. Orne's testimony in *Hurd* and the procedural guidelines which the *Hurd* court adopted were consistent with the testimony of Bundy's experts, Drs. Kuypers and Kline.

The *Hurd* court adopted the following rule:

> Whenever a party in a criminal trial seeks to introduce a witness who has undergone hypnosis to refresh his memory, the party must inform his opponent of his intention and provide him with the recording of the session and other pertinent material. The trial court will then rule on the admissibility of the testimony either at a pretrial hearing or at a hearing out of the jury's presence. In reviewing the admissibility of hypnotically refreshed testimony, the trial court

A7

should evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on expert testimony presented by the parties. The object of this review is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory.

Id. at 543, 432 A.2d at 95 (footnote omitted).

The *Hurd* court went on to elaborate on how the trial court should implement this rule. First, the court should determine whether hypnosis should have been used on the witness in the first place, and, once it is determined whether the witness was one who would yield normal recall with properly administered hypnosis, determine whether the procedures followed were reasonably reliable. *Id.* at 543–44, 432 A.2d at 95–96. The *Hurd* court adopted strict procedural safeguards set forth in the Orne affidavit and mandated compliance with these safeguards by the proponent of testimony enhanced by hypnosis. First, an independent psychiatrist or psychologist, not regularly employed by the prosecution or defense, should conduct the interview. Second, any information transmitted to the hypnotist concerning the case must be recorded in some manner. Third, the hypnotist should derive as detailed a statement as possible from the witness prior to induction. Fourth, all meetings between the hypnotist and subject must be recorded. Finally, only the hypnotist and the subject should be present during the hypnotic encounter. The court cast the burden of proof on the proponent of such evidence to establish admissibility by clear and convincing proof.

The *Hurd* court justified where it was placing the burden by stating:

> We recognize that this standard places a heavy burden upon the use of hypnosis for criminal trial purposes. This burden is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice. Hypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence. The burden of proof we adopt here will assure strict compliance with the procedural guidelines set forth in this opinion. It will also limit the admissibility of this kind of evidence to those cases where a party can convincingly demonstrate that hypnosis was a reasonably reliable means of reviving memory comparable in its accuracy to normal recall.

Id. at 546–47, 432 A.2d at 95 (footnote omitted).

At least two state supreme courts have definitively rejected the analysis espoused in *Hurd*. In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Pennsylvania Supreme Court opted to follow the rationale of *Mack* and *Mena*. The court stated:

> The *Hurd* court's rationale that hypnotically-refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that "the traditional guarantees of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process." . . . The probative worth of the hypnotically-adduced evidence cannot overcome the serious and fundamental handicaps inherent therein.
>
> . . . . . .
>
> While we do not want to establish a *per se* rule of inadmissibility at this time, we will not permit the introduction of hypnotically-refreshed testimony until we are presented with more conclusive proof than has been offered to date of the reliability of hypnotically-retrieved memory.

Id. at 109–111, 436 A.2d at 177–78.

In *Nazarovitch* a witness came forward three years after the murder of a twelve-year-old girl and told police she might know something about the murder. Prior to this time, this witness had been ques-

A8

tioned on several occasions but had provided no significant information. She was then hypnotized by two state-sponsored hypnotists on four separate occasions and, on the basis of her hypnotically refreshed recollection, Nazarovitch and others were charged with the murder.

The California Supreme Court also rejected the application of the *Frye* rule as it had been applied in *Hurd* and opted to follow *Mack* and *Nazarovitch* in its decision in *People v. Shirley*, 31 Cal.3d 18, 641 P.2d 775, 181 Cal.Rptr. 243, *cert. denied*, 458 U.S. 1125, 103 S.Ct. 13, 73 L.Ed.2d 1400 (1982). The court declined to follow the effort to develop a set of safeguards sufficient to avoid the risks inherent in admitting hypnotically induced testimony, stating that it had not been persuaded that the *Hurd* requirements would forestall the dangers at which they were directed or address all the dangers of hypnosis involved. Accordingly, the court stated:

> [W]e observe that certain dangers of hypnosis are not even addressed by the *Hurd* requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility of the subject; none will directly avoid the additional risks, recognized elsewhere in *Hurd*, that the subject (1) will lose his critical judgment and begin to credit "memories" that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection....
>
> Lastly, even if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process....
>
> ....
>
> ... [W]e join instead a growing number of courts that have abandoned any pretense of devising workable "safeguards" and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the *Frye* test.

31 Cal.3d at 39–40, 641 P.2d at 787, 181 Cal.Rptr. at 255.

In *Bundy v. State I*, this Court discussed *Shirley* and also the decision of *Brown v. State*, 426 So.2d 76 (Fla. 1st DCA 1983), ..om the Florida First District Court of Appeal in which that court adopted the theory that safeguards could be followed to avoid the recognized dangers of potential improper prejudice. In this Court's *Bundy v. State I* decision dealing with the Chi Omega murders we were not faced with the issue confronting us in this appeal. We specifically recognized that we were not deciding whether the enhancement of a subject's memory by hypnosis is evidence which must meet the *Frye* test of general scientific acceptance in order to be admissible. The witness in the Chi Omega case repudiated any independent personal knowledge of the details elicited during the hypnotic trance and the trial judge was satisfied that her trial testimony was based on her own recollection unaffected by the hypnotic experiment. Under those circumstances we held that the fact that the hypnosis took place was a matter relating only to the weight of the testimony and not to its admissibility.

In the present case we are faced with a witness whose memory has been "refreshed" or "enhanced" through state-sponsored hypnosis. Bundy's experts described the numerous inappropriate procedures and questions utilized by the social workers who administered the hypnosis to the witness, C.L. Anderson, in their attempts to enhance Anderson's recall through hypnosis. Both experts also gave their opinion that Anderson should never have been hypnotized in the first place because of the lapse of time between the event he was attempting to remember and the hypnotic episodes and because of all the information he had learned about the event during that intervening period of time. The experts' opinion was that Anderson's testimony was unreliable.

A9

[1] We are swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial. Nor can we agree that employing safeguards has been shown to insure that hypnotically recalled testimony is reliable at the present time. The Michigan Supreme Court recently joined the growing number of jurisdictions that hold that the testimony of a witness whose memory has been refreshed through hypnosis is inadmissible. We feel that court's conclusion in *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982), aptly describes our view on this issue. The court stated:

> Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
>
> ...[U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.

Id. at 626–27, 329 N.W.2d at 748. For these reasons, we likewise hold that hypnotically refreshed testimony is *per se* inadmissible in a criminal trial in this state, but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis.

[2, 3] We must now consider whether the inadmissibility of posthypnotic testimony is to be retrospectively or prospectively applied. The Arizona Supreme Court in *Collins* thoroughly analyzed this issue and we agree with that court's conclusion that this unforeseen change in the law and the burden that retrospective application would place on the administration of justice and the need for finality in criminal cases support a holding of prospective application only. In *Collins* the court looked to the criteria established by the United States Supreme Court to guide us in determining when principles should be retroactively applied. This process involves an examination of: 1) the process to be served by the new standard; 2) the extent of the reliance by law enforcement authorities on the old standards; and 3) the effect on the administration of justice of a retroactive application of the new standard. *See Brown v. Louisiana*, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). We have also relied on these essential considerations in our prior decisions. *See, e.g., Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The purpose of our ruling is to exclude from a criminal trial posthypnotic testimony because of its basic unreliability. We do not feel this purpose warrants the reexamination of unknown numbers of jury verdicts. Applying the second criterion we find that the apparent reliance of the police on the use of hypnosis also clearly weighs in favor of the prospective application of our ruling. The police and other law enforcement authorities had no notice that placing persons under hypnosis would preclude their testimony at a subsequent trial. The third criterion to be considered is the effect of retroactive application on the administration of justice. There are obvious practical considerations, in addition to the taxing of trial and appellate courts, in denying retroactive application of our ruling. Only where there is a denial of a basic right of constitutional magnitude that is correctable will retroactive application be applied. This is not the case here.

[4–8] We hold that any posthypnotic testimony is inadmissible in a criminal case if the hypnotic session took place after this case becomes final. We further hold that any conviction presently in the appeals pro-

A10

cess in which there was hypnotically refreshed testimony will be examined on a case-by-case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction. We believe this holding balances the competing interests and is the most equitable place to draw the line. Furthermore, we feel certain limitations on the rule should apply. First a previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensibly or understand his duty to tell the truth on his abilities to perceive and to remember. Accordingly, such a witness could testify to all events other than the new matter discovered at the hypnotic session. Second, we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. Any corroborating evidence obtained is admissible in a criminal trial subject to other evidentiary objections.

[9] We must now determine whether, on the facts of this case, there was sufficient evidence, excluding the hypnotically recalled testimony, to uphold Bundy's conviction. The United States Supreme Court has articulated the harmless-constitutional-error rule to be a question of whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

[10] The record shows that Mr. Anderson's testimony was refreshed under hypnosis as to only three details. Under hypnosis he was able to recall that the football jersey which the girl he described was wearing was blue and the numbers were "63" or "68." He was also able to remember that part of the man's attire was a pullover sweater and a shirt. After a thorough examination of the record before us in this case, we feel that sufficient evidence does exist, absent the tainted testimony, upon which the jury could have based its conviction of Bundy. There is no reasonable possibility that the tainted testimony complained of might have contributed to the conviction.

[11] The second point that Bundy has raised on this appeal is whether the trial court erred in denying the defense's motion to limit death qualification of the jury. Bundy's argument is novel on this issue in that, in effect, he is urging the non-application of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The substance of his point is that the differences between the Illinois death penalty statute under consideration in *Witherspoon* and the Florida statute cause Florida's interest in excluding jurors who would automatically vote against the death penalty to be non-existent. Therefore, Bundy urges, his interest in a jury composed of a cross-section of the community controls and the trial court erred in excusing those jurors who were unalterably committed to vote against the death penalty. The state maintains that we are precluded from ruling on this issue since the objections on this ground were never raised in the trial court. We agree. *Steinhorst v. State*, 412 So.2d 332 (Fla.1982).

The third point Bundy raises is whether the trial court erred in denying defendant's motion for change of venue or abatement of prosecution. Bundy argues that this inquiry demands an analysis of the collision of first amendment guarantees belonging to the press and the media with his right to have a fair and impartial trial under the fifth and sixth amendments. Accordingly, he argues that the trial court should have granted the defense's motion since it was the least burdensome alternative that would have constitutionally balanced these competing rights. The state's counterargument is that Bundy has failed to specifically direct us to specific portions of the record which require a finding of constitutional unfairness as to the character of the jurors selected. We agree.

[12-14] The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. In *Murphy v. Florida*,

421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), which dealt with the prosecution of the newsworthy "Murph the Surf" for a breaking and entering charge, the United States Supreme Court recognized that qualified jurors need not be totally ignorant of the facts and issues involved in a case. The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' impartiality. It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court. *Id.* at 799–800, 95 S.Ct. at 2035–2036 (quoting *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). *See also Dobbert v. Florida*, 432 U.S. 282, 302, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Dobbert v. State*, 328 So.2d 433, 440 (Fla.1976). The record shows that, of the twelve jurors at Bundy's trial, three had no knowledge of the Chi Omega murders. Of those three, two had never even heard of Bundy. Five of the remaining nine had some knowledge of the Chi Omega murders, but they had no more than sketchy ideas of what had occurred. The four remaining jurors did know about Bundy's conviction for the Chi Omega murders. However, all the jurors stated they would put aside any opinion they might hold and decide the case only on the evidence presented. We hold that Bundy has failed to show that he did not receive a fair and impartial trial because the setting or time of his trial was inherently prejudicial. The trial judge committed no error in denying the motion for change of venue or abatement of prosecution.

[15] The fourth point raised is whether the trial court erred in failing to hold a *Frye* inquiry on its own motion concerning the fiber and shoe track evidence to determine whether the evidence to be presented and the testimony concerning that evidence were both reliable and relevant. Bundy failed to make an objection on this ground in the trial court and he has not demonstrated fundamental error. Therefore, consideration of this point is procedurally barred.

[16] Bundy also raises the issue of whether the trial court erred in denying the defense's motion for a view of the crime site. Such a determination is left to the discretion of the trial judge and there is a presumption as to the correctness of his rulings in the absence of a demonstration to the contrary. *Rankin v. State*, 143 So.2d 193, 195 (Fla.1962); *Duron v. State*, 143 Fla. 277, 196 So. 604, 605 (1940). Bundy claims that Anderson's recall of the abduction of the Leach girl would be obviously inconceivable had a view of the site been granted by the trial court. Counsel had substantial opportunity, which he exercised, to cross-examine Anderson. In addition, the view had substantially changed from the time of the Leach girl's disappearance in 1978 to the time of Bundy's trial in this cause in 1980. The record shows the road had been widened and fourlaned which would have changed distance evaluation and traffic patterns. Bundy has failed to demonstrate an abuse of discretion by the trial court.

The sixth point raised by Bundy is whether the trial court erred in denying his motion to exclude evidence of flight and the subsequent jury instructions on flight. Bundy argues that the state must be required to prove that the flight was due to the guilty knowledge of the defendant of the crime for which he is on trial beyond a reasonable doubt and to the exclusion of any other explanation for the flight. Unless the state can show that Bundy had *no other* reason to flee, Bundy argues, the state should not be allowed to introduce evidence of flight.

The probative value of flight evidence as circumstantial evidence of guilt has been analyzed by the Fifth Circuit Court of Appeals as depending upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *United*

A12

States v. Myers, 550 F.2d 1036, 1049 (5th Cir.1977). These criteria have also been applied by the Eleventh Circuit Court of Appeals in *United States v. Borders*, 693 F.2d 1318, 1325 (11th Cir.1982), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983). In *Borders* the court noted that the cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. For instance, the probative value of flight evidence is weakened: 1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, *United States v. Beahm*, 664 F.2d 414, 419–20 (4th Cir.1981); 2) where there were not clear indications that the defendant had in fact fled, *Myers*, 550 F.2d at 1049–50; or, 3) where there was a significant time delay from the commission of the crime to the time of flight. *See, e.g., United States v. Howze*, 668 F.2d 322, 324–25 (7th Cir. 1982); *Myers; United States v. White*, 488 F.2d 660, 663 (8th Cir.1973). The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. *Borders*, 693 F.2d at 1325.

[17] We see no defects which would render the evidence presented in this case inadmissible. When Bundy was apprehended in Pensacola after fleeing from the officer who had stopped him, it was only six days after the Leach girl had disappeared. The disappearance had attracted much publicity and we feel it is a reasonable inference to make that Bundy fled from the officer as a result of consciousness of guilt on his part for the Leach crime. Likewise, it was two days after the Leach crime when Bundy fled from Officer Dawes after Dawes spotted the license tag on the floorboard of the car which Bundy was apparently using. It is reasonable that a jury could infer such circumstantial evidence to be evidence of guilt. Accordingly, we hold that the two incidents of flight were properly admitted as relevant evidence which a jury could use as circumstantial evidence of guilt. *Cf. Mackiewicz v. State*, 114 So.2d 684, 689 (Fla.1959), *cert. denied*, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960); *Daniels v. State*, 108 So.2d 755, 760 (Fla.1959). The judge's instructions to the jury concerning the evidence of flight was also proper. *Proffitt v. State*, 315 So.2d 461, 465–66 (Fla.1975), *aff'd*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Finally, Bundy challenges the trial court's findings which were relied on in sentencing him to death. Specifically, Bundy challenges the court's finding that the aggravating circumstance enumerated in section 921.141(5)(h), Florida Statutes (1977), existed. That subsection reads:

> The capital felony was especially heinous, atrocious or cruel.

The court found the following:

> The court finds that the victim was a twelve year old female junior high school student attending the Lake City Junior High School. The Defendant kidnapped her from the said Junior High School sometime between 9 and 10 am on February 9, 1978, and her deteriorated body was found in a hog pen approximately 45 miles from the scene of abduction on April 7, 1978. The victim died of homicidal violence to the neck region of the body. At the time the body was found it was unclothed except for a pullover shirt around the neck. There were semen stains in the crotch of her panties found near the body. Blood was found on the bluejeans also found near her body, and there were tears and rips in some of her clothes. The Court finds this kidnapping was indeed heinous, atrocious and cruel in that it was extremely wicked, shockingly evil, vile and with utter indifference to human life.

[18, 19] This Court explained the language in subsection 921.141(5)(h) in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

A13

Id. at 9. Bundy argues that the absence of proof establishing the cause of Leach's death and the attendant circumstances surrounding it give the court no factual basis which can justify a finding that this aggravating factor exists. We must agree. No specific cause of death could be determined from the autopsy reports. There was no clear evidence offered to show that Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension, or was sexually assaulted before her death. In the absence of these types of facts, we must conclude that this case does not fit in with our previous decisions in which we have found the manner of the killing to be the conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel. *See, e.g., Smith v. State*, 424 So.2d 726 (Fla.1982), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983) (where evidence showed the victim was abducted, confined, and sexually abused by the defendant and then lead into a wooded area and killed execution-style by three shots to the back of her head); *Bolender v. State*, 422 So.2d 833 (Fla.1982), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (defendant methodically held the victims at gunpoint and ordered them to strip and then beat and tortured them throughout an evening before killing them).

Bundy also challenges the trial court's finding that the aggravating circumstances as described in subsections 921.141(5)(a) and 921.141(5)(b) existed. Bundy argues that the findings under these subsections involved the same convicted act and this constituted an impermissible doubling of aggravating circumstances. Section 921.141(5)(a) states:

> That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

The court's finding read:

> The unrefuted testimony established beyond a reasonable doubt that the Defendant was under sentence for aggravated kidnapping in the State of Utah which had not been served, paroled, or pardoned.

Section 921.141(5)(b) states:

> The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

The court found:

> The unrefuted testimony established beyond a reasonable doubt that the Defendant had been convicted of the crime of aggravated kidnapping in the state of Utah and that it was a crime involving the use of, or threat of violence to some person. Further, the Court finds that on July 31, 1979, the Defendant was convicted by the Circuit Court of Dade County, Florida, for the capital felonies of murder of Lisa Levy and of Margaret Bowman (two counts), and of the following felonies involving the threat of violence to some person:
>
> (1) Attempted murder of Karen Chandler;
>
> (2) Attempted murder of Cathy Kleiner;
>
> (3) Attempted murder of Cheryl Thomas; and
>
> (4) burglary of a dwelling with the intent to commit the offense of battery and to commit an [assault] on a person therein, to-wit: Cheryl Thomas.

[20, 21] The state contends that the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) applies. We agree. In *State v. Hegstrom*, 401 So.2d 1343, 1345 (Fla.1981), this Court noted that in the absence of a clear contrary legislative intent the *Blockburger* test must be met before multiple punishments are permissible. Under *Blockburger* the same act violates two statutes only if each statutory provision requires proof of a fact that the other does not. 284 U.S. at 304, 52 S.Ct. at 182. It is obvious that these two subsections, 921.141(5)(a) and 921.141(5)(b), each require proof of a fact that the other does not. The trial court did not err in finding both aggravating circumstances.

A14

[22] Bundy's next objection is to the trial court's admission of the testimony of an investigator from the district attorney's office in Vail, Colorado, to prove that Bundy had escaped from jail in Colorado. We find no merit to Bundy's argument that this testimony was incompetent and rank hearsay. We find that the testimony offered was competent and sufficient to establish the aggravating circumstance.

We conclude that the trial court correctly found three aggravating circumstances and no mitigating circumstances. We have compared the circumstances found in the present case with those shown in other capital cases.

In *Alford v. State*, 307 So.2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976), this Court affirmed the judgment and sentence of the defendant who had raped and murdered a thirteen-year-old girl. The murder of the victim was found to have been committed while the defendant was engaged in the commission of or in flight after committing the life felony of rape of the same victim. The act was found to be especially heinous, atrocious and cruel. The victim had been raped both vaginally and rectally, was blindfolded, and was shot five or six times. No mitigating circumstances were found to exist.

In *Martin v. State*, 420 So.2d 583 (1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983), the defendant, an eighteen-year-old high school dropout, had abducted, committed sexual battery on, and murdered a college student who was temporarily employed in a convenience store. Five aggravating circumstances were found by the trial judge and supported by the record including the findings: 1) that the murder was committed while the defendant was engaged in flight after committing robbery, rape, and kidnapping; 2) that the murder was committed while the defendant was under sentence of imprisonment at the time; and, 3) that the defendant had previously been convicted of felonies involving the use or threat of violence to the person.

In *Stevens v. State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983), we affirmed a death sentence where the defendant had robbed a convenience store and then raped, strangled, stabbed, and killed the victim. The trial court properly found four aggravating circumstances including that the murder was committed in the commission of or the flight after committing rape and kidnapping.

After weighing the evidence in this case we conclude that the sentence of death imposed was justified and appropriate under our law. We affirm the judgments of conviction and sentence of death.

It is so ordered.

OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

BOYD, C.J., concurs specially with an opinion.

BOYD, Chief Justice, concurring specially.

I concur in the affirmance of the convictions and sentence. Because I find that the testimony of the hypnotized witness was based on his independent recollection of the event he saw and was not significantly affected by the hypnosis, I conclude that the testimony was properly admitted. *See Bundy v. State*, 455 So.2d 330 (Fla.1984).

Because the eyewitness identification testimony, the crucial link in the chain of circumstantial evidence of appellant's guilt was, as the Court finds, not substantially affected by the use of hypnosis, it is not necessary for us to treat the question of whether testimony derived from hypnotic memory-enhancement techniques is admissible evidence in the courts of Florida.

As the sources discussed in the majority opinion clearly demonstrate, the great weight of legal and scientific authority regards testimony derived from so-called hypnotically refreshed or enhanced memory as highly suspect and unreliable. As scientific understanding of the phenomenon of hypnosis has advanced, the clear trend

A15

of judicial decisions is to hold testimony derived from it inadmissible. At the very least, it is clear that such testimony is inadmissible where the hypnotic memory-enhancement procedure is performed without following strict safeguards widely regarded as necessary to the reliability of the technique. Although some degree of care was exercised in this case, the procedure used was not accompanied by safeguards that would be considered adequate under the case law of jurisdictions that recognize the procedure as reliable when safeguards are followed.

Even where hypnotic testimony is regarded as inadmissible or as highly suspect, it has been recognized that testimony based on independent recollection not affected by the attempted hypnotic enhancement can be admissible. *See, e.g., State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 209–10, 644 P.2d 1266, 1295–96 (1982) (supplemental opinion); *People v. Lucas*, 107 Misc.2d 231, 435 N.Y.S.2d 461 (Sup.Ct. 1980). I believe this principle applies in the present case.

Rather than decide the case only on the basis of the above-stated principle, the Court now places Florida squarely among the apparently growing number of jurisdictions in which it is held that testimony derived from hypnotically refreshed memory is *per se* inadmissible in evidence at a criminal trial. Yet at the same time the majority concludes, as I do, that the central or essential substance of the hypnotized witness's testimony was not significantly affected by the improper attempt to enhance memory by hypnosis. Thus it appears to me that the majority's rule of *per se* inadmissibility is merely an advisory opinion to the courts of Florida because it is not necessary to apply the rule in this case. This observation brings me to my only real objection to the majority opinion and the reason for the writing of this separate opinion.

When a person tried for and convicted of a crime challenges the conviction on appeal on the ground, properly raised at trial, that a crucial and prejudicial item of evidence against him was unreliable evidence and improperly admitted, and the appellate court rules that the evidence was indeed unreliable and prejudicial, then that appellant is entitled to the benefit of the ruling and should be given a new trial. This is so regardless of previous reliance on the old rule or previous ambiguity in the law. Therefore if we were faced with a situation where the crucial identification testimony was actually obtained through improper use of hypnosis, we would be required to reverse the conviction. To apply a new rule of inadmissibility of evidence in a criminal trial prospectively only is highly improper.

To apply such a new rule to the case in which the rule is fashioned and to all cases decided on appeal thereafter is necessary; this does not mean that the rule must necessarily be given retroactive effect upsetting the finality of cases already decided on appeal. I find the majority's treatment of this issue confusing and unnecessary.

We are not required to reverse the convictions here because the testimony in question was not produced by hypnosis. I therefore concur in the affirmance of the convictions. Regarding the appropriateness of the sentence of death, I concur in the majority opinion.

Luis ACOSTA, Petitioner,

v.

KRACO, INC., and Corporate Group Services, Respondents.

No. 65214.

Supreme Court of Florida.

May 9, 1985.

Rehearing Denied July 11, 1985.

Workers' compensation claimant appealed from order of deputy commissioner

A16

STATE vs. THEODORE ROBERT BUNDY (Columbia County)

INTERVIEW OF: CLARENCE LEE ANDERSON, JR.

PRESENT: Bob Dekle, Assistant State Attorney, Paul S. Bryan, Assistan State Attorney, Larry Daugherty, Investigator with the Lake Police Department and Clarence Lee Anderson, Jr., Witness.

This is the first page of an interview appearing later - also the last page of the Daugett interview is on back (page out of order

DATE: July 28, 1978

TIME: 10:00 A. M.

PLACE: Lake City Police Department, Office of Investigator Larry Daugherty.

MR. DEKLE: This will be an interview in the case of State of Flori vs. Theodore Robert Bundy. Raise your right hand pleas Do you solemnly swear that the testimony you are about t give before me as Assistant State Attorney will be the truth, the whole truth and nothing but the truth so hel you God?

MR. ANDERSON: (Inaudible)

MR. DEKLE: State your name please?

MR. ANDERSON: Clarence Lee Anderson, Jr.

MR. DEKLE: And your address?

MR. ANDERSON: Right now it's [redacted], O'Brien, Florida.

MR. DEKLE: [redacted], O'Brien, Florida? How found out were you might can move?

MR. ANDERSON: I'm living in my brother-in-law's house temporarily whil I'm having a new house built.

MR. DEKLE: (Inaudible)

MR. ANDERSON: I'm employed by the Lake City Fire Department.

MR. DEKLE: (Inaudible)

MR. ANDERSON: I'm use to that.

MR. DEKLE: (Inaudible)

Now, laying all jokes aside (inaudible) ah..... You came to the police department youself and told them you might have some information in the case (inaudible)

MR. ANDERSON: That's correct.

MR. DEKLE: Alright sir, what...what was it that you saw that caused you to come here?

MR. ANDERSON: Well, this morning when I was watching the news, I saw Theodore Bundy on TV and when I saw him, he turned side ways and I saw a profile of him. He looked an awful lot like the man that I saw put a dark haired girl in his white van in front of the Lake City Junior High school.

MR. DEKLE: When was it that you saw this man put this girl into the white van?

MR. ANDERSON: I can't remember the exact date.

MR. DEKLE: Just approximately?

MR. ANDERSON: Four months ago around April ah... .-

MR. DEKLE: Could it have been over or past.....-(inaudible)

MR. ANDERSON Ah., I saw the man and the girl before (inaudible)

MR. DEKLE: You say you don't know exactly when?

MR. ANDERSON: No. I can't remember a date.

MR. DEKLE: But it was just a short time before or.....

MR. ANDERSON: It was a very short time, probably less than a week before ya'll found out there was a girl missing and started searching for her.

MR. DEKLE: Alr. ht, now you say you saw a man, who looked very similar to Bundy, put a girl in a white van? Tell me where it was you saw it?

MR. ANDERSON: In front of the Junior High School. It was on West Duval Street, almost at the corner of Second Street and Duval Street. It was a little bit west of Second Street.

_____ About what time of/day was this?

MR. ANDERSON: It was morning.....mid-morning between 9:00 A.M. and 10:00 A.M. Roughly.

MR. DEKLE: What were you doing over there at that time that caused you (inaudible)

MR. ANDERSON: Ah.....I think I had come up to the Fire Station for overtime. (Inaudible)

MR. DEKLE: Going back to O'Brien?

MR. ANDERSON: _____ At this time I lived at 1662 Park Street.

MR. DEKLE: Okay so you were going home?

MR. ANDERSON: Right.

MR. DEKLE: Tell me just exactly what it was you saw?

(first page appears earlier out of order)

-2-

A18

MR. ANDERSON: Ah.....There was a white van parked in the street against the curb and had traffic backed up _____ _____ several cars had pulled around it and was _____ that's when I saw a man and young gir the man had the girl by the, let's see, he had her b the left arm approximately _____ and ah..... she had an unhappy look on her face and I thought at the time you know some little girl had got in trouble and daddy had come to take her home. And well she was really _____but he had her by the arm like you would _____. He led her across the street in front of the van and opened the door on the passenger side and helped the girl get in the van and slammed the door of the van and ah....just/drove o

MR. DEKLE: Alright, did she resist him in anyway? Pulling back or _____?

MR. ANDERSON: She wasn't pulling back but she seemed reluctant to go. Like he wasn't actually dragging her or you know forcin her...he was walking ahead of her and had her by the ar

MR. DEKLE: She was lagging behind?

MR. ANDERSON: Yeah. Kind of dragging her feet.

MR. DEKLE: Okay. Now he went around to the passenger side of the _____?

MR. ANDERSON: Hm-ah.

MR. DEKLE: Okay how did he get in himself?

MR. ANDERSON: He went back around the van.

MR. DEKLE: To the driver's side?

MR. ANDERSON: To the driver's side.

MR. DEKLE: Did /He walk around the back or front of the van?

MR. ANDERSON: Front.

MR. DEKLE: Did he walk, run or what?

MR. ANDERSON: Kind of a quick jog. (Inaudible)

MR. DEKLE: You say this van had traffic backed up?

MR. ANDERSON: Yeah. One or two cars between me and the van. Maybe.

MR. DEKLE: So all you ever saw then was the back of the van.

MR. ANDERSON: Hm-ah.

MR. DEKLE: Ah, ah.....tell me, describe the man as best you can?

MR. ANDERSON: Well.....he was medium build, you know he wasn't real muscular or he wasn't really skinny. Ah.....probably 5'7"--5'10" (inaudible)

He had medium, maybe a little bit darker than medium br hair, full cut but not long and the hair was kind of wa That's all I can remember.

MR. DEKLE: Can you describe what he was wearing?

MR. ANDERSON: Ah....probably light...the shirt or jacket were light. I can't remember whether he was wearing / slacks or dungarees

MR. DEKLE: What about the girl, what was she wearing?

MR. ANDERSON: Dungarees or slacks and a dark pullover and she was carrying something in her hand, I don't if /it was a sweater or jacket or large pocketbook.

MR DEKLE: Okay. Do you recall the girls hair color or hair_____

MR. ANDERSON: It was black hair almost shoulder length. Parted in t middle. She looked young. I guess she was 12 or 13.

MR. DEKLE: Okay. Now, what what happened after the man got in?

MR. ANDERSON: He just drove away.

MR. DAUGHERTY: Drove away? Did he drive away at a high rate of speed or.....?

MR. ANDERSON: No, he just drove away.

MR DEKLE: Do you recall anything distinctly about the man?

MR. ANDERSON: No, ah.....

MR. DEKLE: Go ahead.

MR. ANDERSON: _____

MR. DAUGHERTY: Did you see the side of the van?

MR. ANDERSON: I didn't see the side.....the side.....-I ah.....I thi the ah.....windows in the rear of the door or doors were covered up.

MR. DEKLE: When the van....when the van pulled off, I assume that were behind it?

MR. ANDERSON: That's right. Following it.

MR. DEKLE: So you must have followed it?

MR. ANDERSON: Yeah I saw him.....

MR. DEKLE: What cause you to _____ did you pull off?

MR. ANDERSON: I turned off.

MR. DEKLE: Ok, during the five blocks that you followed him, did you notice anything unusual about how _____, the way he was driving it, what _____

And shortly after that you started

MR. ANDERSON: Well, I first heard they were looking for a white car and then later on I heard they were looking for a white van and this was when it really begin to bother me about what I'd seen but I still wasn't sure enough to really mention it to anybody and I did mention to Frank Moore and then but I can't remember exactly how I said it and I said there's once slight chance it could have been the guy that I saw.

MR. DEKLE: _____

MR. ANDERSON: And right about the time

MR. DEKLE: And Frank advised you to do what?

MR. ANDERSON: Well, Frank said that ah....you know he at one time thought the he might have seen him lead the girl down at Hamburger Lake where he had been fishing and ah.... we really didn't have any big discussion about it. I really wasn't.....I still had a lot of doubts about it. I didn't want to come to the Police Department on a wild goose chase for something for them to run down. And I still have a lot of doubt about it until I was talking to you about it this morning. I've seen pictures of Bundy in the papers and I could see where there was a resemblance but until this morning when I saw the news and I seen him turn sideways, well when I seen his profile, I knew I had to come tell somebody about it cause it looks an awful lot like the man.

MR. DEKLE: Okay. (inaudible)

MR. ANDERSON: Hm-ah.

MR. DEKLE: And so it's the first time you saw the profile of Bundy and I assume that (inaudible)

{where is remainder

A 21

RE: STATE OF FLORIDA vs. THEODORE ROBERT BUNDY (Columbia County)

DATE: July 28, 1978 Transcribed By: Estralita Benn SAO

STATEMENT OF: CLARENCE "Andy" ANDERSON

PRESENT: George R. Dekle, Paul S. Bryan, Larry Daugherty, Dale Parr Chief Paul Philpot, Imogene Keene & Clarence Anderson.

MS. KEENE: Okay, Andy as I count 10 to 1, I want you to go back, back in time to the time a few months ago that you hav just described this morning here at the police departm You will go back and you will be able to see more deta and describe exactly what you actually saw on that dat As I count 10 to 1 now, the pages of time are going b you are going back, you are going back back to that da 10-9-8-7--6-5-4-3-2-1. You are back to the day that y described to the police officers this morning. Now wou you tell me out loud, you may speak to me and answer th questions. Where are you now?

MR. ANDERSON: Lake City Police Department.

MS. KEENE: Very good, very, very good. Try now to go back go back a few months ago to the particular situation now...the particular situation that you have just described. You have just described. /Described it at the police statio but now you can go back..gooo back and in your mind fro your subconscious now bring all of this information bac 5-4-3-2-1. You are there now. What are you seeing?

MR. ANDERSON: I just stopped my truck on West Duval Street.

MS. KEENE: What day is this Andy?

MR. ANDERSON: I don't remember.

MS. KEENE: Do you have a watch or something or is anything happenin that day?

MR. ANDERSON: I just got off duty _____.

MS. KEENE: Just got off duty? What time did you get off duty?

MR. ANDERSON: At 8:00 o'clock.

MS. KEENE: At 8:00 o'clock. Where did you go after you got off dut

MR. ANDERSON: I was going home.

MS. KEENE: Going home. Why are you on West Duval Street?

MR. ANDERSON: I live in that direction.

MS. KEENE: Okay. Are you now driving along or are you stopped some-place?

Aff'x V.

MR. ANDERSON: I'm stopped.

MS. KEENE: You're stopped. Why have you stopped?

MR. ANDERSON: There's a truck ahead.

MS. KEENE: A truck is ahead of you. Are you actually in the line o traffic?

MR. ANDERSON: Yes.

MS. KEENE: About what...what time is it?

MR. ANDERSON: It's about 9:00.

MS. KEENE: About 9:00 o'clock. Have you just looked at your watch?

MR. ANDERSON: No.

MS. KEENE: Can you describe the truck in front of you?

MR. ANDERSON: It's white.

MS. KEENE: A white truck. A..a...what model? year? What.....give m more detail about the truck.

MR. ANDERSON: A van.

MS. KEENE: A van. Is this directly in front of you?

MR. ANDERSON: Yes.

MS. KEENE: The next car in front of you?

MR. ANDERSON: Green.

MS. KEENE: Green. It's a green car in front of you and then what...

MR. ANDERSON: A small car.

MS. KEENE: A small green car. Do you know the license? Can you see license number?

MR. ANDERSON: No. No.

MS. KEENE: Okay, what is in front of the green car? Is there a vehi in front of the green car?

MR. ANDERSON: I've_____ first a large car then a small car.

MS. KEENE: Okay.

MR. ANDERSON: The large car is green.

MS. KEENE: The large car is green. And the small car?

MR. ANDERSON: Ah...blue. Part blue.

MS. KEENE: Where is.....you said a moment ago that you saw a whit van. Where is this van?

MR. ANDERSON: In front of the small blue car.

MS. KEENE: In front of the small blue car. So, it is three cars in front of you. Three vehicles in front of you.

MR. ANDERSON: Yes.

MS. KEENE: You're moving in the line of traffic now?

MR. ANDERSON: No, I'm stopped.

MS. KEENE: You are stopped.. Look ar.....can you tell me aroun
Where are you? What buildings? Or What.....-

MR. ANDERSON: Junior High School.

MS. KEENE: Junior High School. Can you now tell me what are you
As you are stopped, can you describe to anything that
seeing? People?

MR. ANDERSON: Two people.

MS. KEENE: Two people. Where are they?

MR. ANDERSON: They're on the left.

MS. KEENE: On your left and you are going.....what direction?

MR. ANDERSON: West.

MS. KEENE: West.

MR. ANDERSON: South....
they.....

MS. KEENE: So/that would be South. Okay. What el....these...are
males, females, what ah...

MR. ANDERSON: It's a young girl.

MS. KEENE: Describe the girl.

MR. ANDERSON Ah....12 or 13 maybe 14.

MS. KEENE: Okay. About how tall?

MR. ANDERSON: Oh....about 5'5"...5'6", maybe not that tall.

MS. KEENE: About average or.....

MR. ANDERSON: Yes ma'am. She's kind of slim.

MS. KEENE: Kind of slim. What color hair?

MR. ANDERSON: Black.

MS. KEENE: Black. Can you describe her hair arrangement or her hairdo

MR. ANDERSON: Ah....it's about....almost to her shoulders, parted in the
middle.

MS. KEENE: Okay, have you ever seen this girl before?

MR. ANDERSON: No.

MS. KEENE: What is she wearing? What color is the pants?

MR. ANDERSON: Bluish.

MS. KEENE: Bluish. Ah...what kind of material?

MR. ANDERSON: Ah...

MS. KEENE: What style pants? Can you be more particular?

MR. ANDERSON: Possible dungarees.

A 24

MS. KEENE: What about her shirt? Or her top?

MR. ANDERSON: Dark.

MS. KEENE: Dark?

MR. ANDERSON: Pullover top _____.

MS. KEENE: What.....more specific about the color?

MR. ANDERSON: Ah.....blue.

MS. KEENE: Is ah....any designs or anything on the shirt?

MR. ANDERSON: I don't think so.

MS. KEENE: Anymore specific detail about the shirt?

MR. ANDERSON: I don't remember.

MS. KEENE: Ah.....Okay what.....is this girl...is she....what is she doing?

MR. ANDERSON: She's being led by a man.

MS. KEENE: A man. Describe the man.

MR. ANDERSON: Early thirties. Average height, 5'8"/5'10" ah.....medium build, not real muscular ah.....wearing a light colored shi. I'm not sure it's a shirt, might be a jacket.

MS. KEENE: What colored trousers.

MR. ANDERSON: I don't remember. He's got medium _____, dark brown hair. It's full, it's not worn long, it's kind of wavy.

MS. KEENE: Okay, would you give more description of .....you said the man is leading the girl or what is he.....-

MR. ANDERSON: He has her by the left arm above the elbow. He's leading her, she's not really resisting, she....she's not fighting.

MS. KEENE: She's.....can you see her face?

MR. ANDERSON: I can't.

MS. KEENE: Okay, just relax. _____ very calm and relaxed. _____

Deeper and deeper in when I count 1 to 5 you are going deeper and deeper and deeper...2-3.....try to put all those muscles in the head and the neck are going slowly are going deeper and deeper and feeling soothing and....- _____ all across the_____deeper and deeper and deeper. _____

Describe....can you see the girl's face?

MR. ANDERSON: Hm-ah.

MS. KEENE: What kind of expressions _____ descr'iption?

MR. ANDERSON: She's crying.

MS. KEENE: She's crying. Anything else you can describe? Can yo
are you close enough to hear anything?

MR. ANDERSON: No.

MS. KEENE: How far are you from these people would you say?

MR. ANDERSON: 30 or 40 feet.

MS. KEENE: 30 or 40 feet. They are walking where?

MR. ANDERSON: They are walking north towards the street.

MS. KEENE: Towards the street. What street?

MR. ANDERSON: West Duval.

MS. KEENE: West Duval. Okay, and looking at this man now that you
describe as leading her. Describe his trousers? You th
it was a shirt or maybe not a shirt or maybe a jacket...
Can you be more specific about that?

MR. ANDERSON: (No response)

MS. KEENE: Alright and you're watching them walk as you described hi
leading her...did you watch them? Are you watching them

MR. ANDERSON: (Unable to hear verbal response)

MS. KEENE: Okay, describing....did they go down the street or or what
what are they...where do they go?

MR. ANDERSON: They're walking towards the white van that's parked in the
street.

MS. KEENE: The white van that's parked in the street.

MR. ANDERSON: He....

MS. KEENE: What.....go ahead.

MR. ANDERSON: He leads her in front of the van.

MS. KEENE: In front of the van.....

MR. ANDERSON: And opens the door on the passenger's side and helps her get
in and slams the door and then runs to the driver's side.

MS. KEENE: AND did you say runs to the driver's side? Did you.....
can you see his shoes?

MR. ANDERSON: No. They drive off.

MS. KEENE: Can you back just a little bit as you saw the man helping
.....putting the girl into the van, was she carrying anything

MR. ANDERSON: Yes.

MS. KEENE: Describe it. What was it? An object or what? Can you.....

MR. ANDERSON: Okay.
I can't remember but I think it was dark.

MS. KEENE: Dark? How was she holding it?

MR. ANDERSON: In her right hand.

MS. KEENE: In her hand, how large is the object?

MR. ANDERSON: It's fairly small.

MS. KEENE: Fairly small.

MR. ANDERSON: It could be a rolled up jacket or a medium sized handbag

MS. KEENE: Okay. Okay, very good. _____. Okay, agai can you tell me more of the color of the object she's carrying?

MR. ANDERSON: No. It's dark.

MS. KEENE: Dark? Is it like black or brown or green or _____?

MR. ANDERSON: Dark blue or black or dark brown.

MS. KEENE: Is....is the man carrying anything?

MR. ANDERSON: No.

MS. KEENE: Alright. Okay again would you describe as you see them approaching the van again, the girl getting into the van? Would you describe that again?

MR. ANDERSON: He leads her in front of the van, he opens the door _____ _____he has the girl with his right hand...he opens the door with his left. He keeps holding her arm and helps he get into the van and then he closes the door. Closes _____.

MS. KEENE: And then what does he do?

MR. ANDERSON: He runs or jogs to the passenger's side.....and drives off.

MS. KEENE: As they are driving off now, does this....are you.....will you describe now how much that you saw? As they drive off can you see the tag number?

MR. ANDERSON: Yes.

MS. KEENE: Very good. You're very very relaxed now as you are looking at that tag. the numbers now can come to you very vividly... you looked at that tag number...the numbers that registered you can recall the numbers of that tag. Now, you looking at that tag now.

MR. ANDERSON: I think it's a Florida tag. I can't remember the numbers.

MS. KEENE: What makes you think it's a Florida Tag?

MR. ANDERSON: It's green and white.

MS. KEENE: You're looking at the tag now, you did look specifically at the tag. See the numbers. You can see the numbers now. You're still

following the van.

MR. ANDERSON: Yes ma'am.

MS. KEENE: Where are you now?

MR. ANDERSON: Seventh Street..... then stopped.

MS. KEENE: You stopped?

MR. ANDERSON: I stopped.....two cars ahead of me stopped. The van rear windows, double doors, the man turned seemed to scolding the girl.

MS. KEENE: Where is the girl in the van?

MR. ANDERSON: Sitting on the passenger's side. I can't see her.

MS. KEENE: You can't see the girl. But the man is talking to son or.....

MR. ANDERSON: Yes.

MS. KEENE: What makes you think he's scolding her?

MR. ANDERSON: His /Gestures.

MS. KEENE: Gestures?

MR. ANDERSON: Yes.

MS. KEENE: Describe his gestures.

MR. ANDERSON: Like you would scold a child if you_____ Just like I got the impression he was scolding her. Reprimanding her for something.

MS. KEENE: Could you see his face? _____ expression?

MR. ANDERSON: Not real clearly. I can see the outline. He appeared to be talking you know.

MS. KEENE: Okay, that's _____ you're doing very very good now would you describe....continue to describe as you're following the van...you're stopping at Seventh Street?

MR. ANDERSON: Hm-ah.

MS. KEENE: The van.....what happened to the van?

MR. ANDERSON: The light changed. They pulled off.

MS. KEENE: Pull off what direction?

MR. ANDERSON: West.

MS. KEENE: West?

MR.ANDERSON: Duval and West 90 separate just pass the railroad tracks and they turn left on U.S. 90 and/continue/on West Duval Street and proceed to go home.

MS. KEENE: Just how far could you see this van? Could you.....

MR. ANDERSON: Hmmm

MS. KEENE: Did you watch the van after it.....

MR. ANDERSON: No....

MS. KEENE: I want you to count to yourself 10 to 1, as you do you are going deeper and deeper along.....deeper and deepe Could you give the exact time that you arrived at home on this date?

MR. ANDERSON: Not the exact time.

MS. KEENE: Approximate, as near as possible.

MR. ANDERSON: A little after nine.

MS. KEENE: After.....how much after nine?

MR. ANDERSON: 10--15 minutes.

MS. KEENE: What did you do after you got home that day?

MR. ANDERSON: Took a shower and went to bed.

MS. KEENE: Okay, and do you know the time that you went to bed?

MR. ANDERSON: Hmmm....9:30 or 9:45. I slept til 12:00.

MS. KEENE: Okay, we want to go back now a few hours earlier on this same date and you're still at work. You are at work now The same day. What was the last activity at work that y did before you left? Can you describe?

MR. ANDERSON: Drank coffee.

MS. KEENE: Who did you drink coffee with?

MR. ANDERSON: I can't remember.

MS. KEENE: Okay. Anything before the coffee can you remember the activity before you drank the coffee?

MR. ANDERSON: Uh-uh.

MS. KEENE: Can you tell me what day, what month this is? That you're recalling now?

MR. ANDERSON: I think it's April, I don't know the date

MS. KEENE: (Inaudible) You're doing very very good now....very rela very calm. Good feeling any time I hypnotize you in the future you will go faster and deeper....faster....you're doing very very good now. I'm going to awaken you on the count of 5, you're going to feel relaxed and calm with a feeling of well being that's going to go with you all the rest of the day. One, two, three, four, five. Okay Andy you can tell us how you feel.

MR. ANDERSON: Tired.

MS. KEENE: Feel that's a _____ ____I realize that your noc was bothering you. That was interfering, wasn't it?

MR. ANSERSON: Hm...my eyes, I trouble keeping my eyes closed.

STATE vs. THEODORE ROBERT BUNDY (Columbia County)

INTERVIEW OF: CLARENCE LEE ANDERSON, JR.

MAP Attached of School Area

PRESENT: Bob Dekle, Assistant State Attorney, Paul S. Bryan, Assistant State Attorney, Larry Daugherty, Investigator with the Lake City Police Department and Clarence Lee Anderson, Jr., Witness.

DATE: July 28, 1978

TIME: 10:00 A. M.

PLACE: Lake City Police Department, Office of Investigator Larry Daugherty.

MR. DEKLE: This will be an interview in the case of State of Flori vs. Theodore Robert Bundy. Raise your right hand pleas Do you solemnly swear that the testimony you are about give before me as Assistant State Attorney will be the truth, the whole truth and nothing but the truth so hel you God?

MR. ANDERSON: (Inaudible)

MR. DEKLE: State your name please?

MR. ANDERSON: Clarence Lee Anderson, Jr.

MR. DEKLE: And your address?

MR. ANDERSON: Right now it's [redacted], O'Brien, Florida.

MR. DEKLE: [redacted], O'Brien, Florida? How found out were you might can move?

MR. ANDERSON: I'm living in my brother-in-law's house temporarily while I'm having a new house built.

MR. DEKLE: (Inaudible)

MR. ANDERSON: I'm employed by the Lake City Fire Department.

MR. DEKLE: (Inaudible)

MR. ANDERSON: I'm use to that.

MR. DEKLE: (Inaudible)

Now, laying all jokes aside (inaudible) ah..... You came to the police department youself and told them you might have some information in the case (inaudible)

MR. ANDERSON: That's correct.

MR. DEKLE: Alright sir, what...what was it that you saw that caused you to come here?

MR. ANDERSON: Well, this morning when I was watching the news, I saw Theodore Bundy on TV and when I saw him, he turned side ways and I saw a profile of him. He looked an awful lot like the man that I saw put a dark haired gir in his white van in front of the Lake City Junior High school.

MR. DEKLE: When was it that you saw this man put this girl into th white van?

MR. ANDERSON: I can't remember the exact date.

MR. DEKLE: Just approximately?

MR. ANDERSON: Four months ago around April ah.....-

MR. DEKLE: Could it have been over or past.....-(inaudible)

MR. ANDERSON Ah.. I saw the man and the girl before (inaudible)

MR. DEKLE: You say you don't know exactly when?

MR. ANDERSON: No. I can't remember a date.

MR. DEKLE: But it was just a short time before or.....

MR. ANDERSON: It was a very short time, probably less than a week before ya'll found out there was a girl missing and started searching for her.

MR. DEKLE: Alright, now you say you saw a man, who looked very similer to Bundy, put a girl in a white van? Tell me where it was you saw it?

MR. ANDERSON: In front of the Junior High School. It was on West Duval Street, almost at the corner of Second Street and Duval Street. It was a little bit west of Second Street.

_____ About what time of/the day was this?

MR. ANDERSON: It was morning.....mid-morning between 9:00 A.M. and 10:00 A.M. Roughly.

MR. DEKLE: What were you doing over there at that time that caused you (inaudible)

MR. ANDERSON: Ah.....I think I had come up to the Fire Station for overtime. (Inaudible)

MR. DEKLE: Going back to O'Brien?

MR. ANDERSON: _____ At this time I lived at 1662 Park Street.

MR. DEKLE: Okay so you were going home?

MR. ANDERSON: Right.

MR. DEKLE: Tell me just exactly what it was you saw?

A32

MR. ANDERSON: Ah.....There was a white van parked in the street against the curb and had traffic backed up _____ _____ several cars had pulled around it and was _____ that's when I saw a man and young gir the man had the girl by the, let's see, he had her b the left arm approximately _____ and ah..... she had an unhappy look on her face and I thought at the time you know some little girl had got in trouble and daddy had come to take her home. And well she was really _____but he had her by the arm like you would _____. He led her across the street in front of the van and opened the door on the passenger side and helped the girl get in the van and slammed the door of the van and ah....just/drove o

MR. DEKLE: Alright, did she resist him in anyway? Pulling back or _____?

MR. ANDERSON: She wasn't pulling back but she seemed reluctant to go. Like he wasn't actually dragging her or you know forci her...he was walking ahead of her and had her by the ar

MR. DEKLE: She was lagging behind?

MR. ANDERSON: Yeah. Kind of dragging her feet.

MR. DEKLE: Okay. Now he went around to the passenger side of the _____?

MR. ANDERSON: Hm-ah.

MR. DEKLE: Okay how did he get in himself?

MR. ANDERSON: He went back around the van.

MR. DEKLE: To the driver's side?

MR. ANDERSON: To the driver's side.

MR. DEKLE: /He walk around the back or front of the van?

MR. ANDERSON: Front.

MR. DEKLE: Did he walk, run or what?

MR. ANDERSON: Kind of a quick jog. (Inaudible)

MR. DEKLE: You say this van had traffic backed up?

MR. ANDERSON: Yeah. One or two cars between me and the van. Maybe.

MR. DEKLE: So all you ever saw then was the back of the van.

MR. ANDERSON: Hm-ah.

MR. DEKLE: Ah. ah.....tell me, describe the man as best you can?

MR. ANDERSON: Well.....he was medium build, you know he wasn't real muscular or he wasn't really skinny. Ah.....probably 5'7"--5'10" (inaudible)

He had medium, maybe a little bit darker than medium brown hair, full cut but not long and the hair was kind of wavy. That's all I can remember.

MR. DEKLE: Can you describe what he was wearing?

MR. ANDERSON: Ah....probably light...the shirt or jacket were light. I can't remember whether he was wearing / slacks or dungarees

MR. DEKLE: What about the girl, what was she wearing?

MR. ANDERSON: Dungarees or slacks and a dark pullover and she was carrying something in her hand, I don't if /it was a sweater or jacket or large pocketbook.

MR DEKLE: Okay. Do you recall the girls hair color or hair_____?

MR. ANDERSON: It was black hair almost shoulder length. Parted in the middle. She looked young. I guess she was 12 or 13.

MR. DEKLE: Okay. Now, what what happened after the man got in?

MR. ANDERSON: He just drove away.

MR. DAUGHERTY: Drove away? Did he drive away at a high rate of speed or.....?

MR. ANDERSON: No, he just drove away.

MR DEKLE: Do you recall anything distinctly about the man?

MR. ANDERSON: No, ah.....

MR. DEKLE: Go ahead.

MR. ANDERSON: _____

MR. DAUGHERTY: Did you see the side of the van?

MR. ANDERSON: I didn't see the side.....the side.....-I ah.....I think the ah.....windows in the rear of the door or doors were covered up.

MR. DEKLE: When the van....when the van pulled off, I assume that you were behind it?

MR. ANDERSON: That's right. Following it.

MR. DEKLE: So you must have followed it?

MR. ANDERSON: Yeah I saw him.....

MR. DEKLE: What cause you to _____ did you pull off?

MR. ANDERSON: I turned off.

MR. DEKLE: Ok, during the five blocks that you followed him, did you notice anything unusual about how _____, the way he was driving it, what _____

And shortly after that you started

MR. ANDERSON: Well, I first heard they were looking for a white car and then later on I heard they were looking for a white van and this was when it really begin to bother me about what I'd seen but I still wasn't sure enough to really mention it to anybody and I did mention to Frank Moore and then but I can't remember exactly how I said it and I said there's once slight chance it could have been the guy that I saw.

MR. DEKLE: _____

MR. ANDERSON: And right about the time

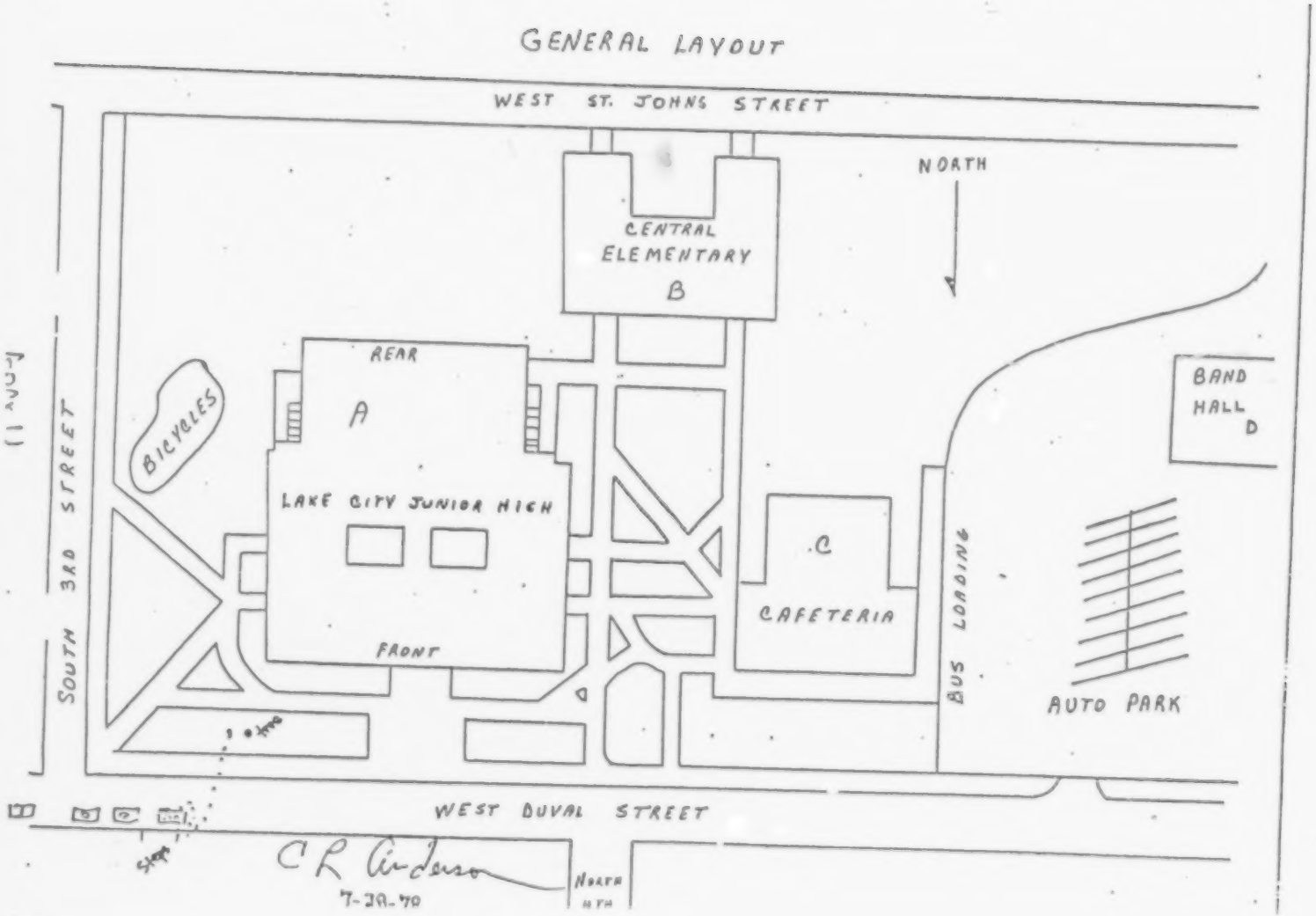
MR. DEKLE: And Frank advised you to do what?

MR. ANDERSON: Well, Frank said that ah....you know he at one time thought the he might have seen him lead the girl down at Hamburger Lake where he had been fishing and ah.... we really didn't have any big discussion about it. I really wasn't.....I still had a lot of doubts about it. I didn't want to come to the Police Department on a wild goose chase for something for them to run down. And I still have a lot of doubt about it until I was talking to you about it this morning. I've seen pictures of Bundy in the papers and I could see where there was a resemblance but until this morning when I saw the news and I seen him turn sideways, well when I seen his profile, I knew I had to come tell somebody about it cause it looks an awful lot like the man.

MR. DEKLE: Okay. (inaudible)

MR. ANDERSON: Hm-ah.

MR. DEKLE: And so it's the first time you saw the profile of Bundy and I assume that (inaudible)


GENERAL LAYOUT
WEST ST. JOHNS STREET
NORTH
CENTRAL
ELEMENTARY
B
REAR
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BICYCLES
LAKE CITY JUNIOR HIGH
FRONT
SOUTH 3RD STREET
C
CAFETERIA
BUS LOADING
BAND
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D
AUTO PARK
WEST DUVAL STREET
C R Anderson
7-29-70
North

RE: STATE OF FLORIDA vs. THEODORE ROBERT BUNDY (Columbia County)

STATEMENT OF: CLARENCE "Andy" ANDERSON

DATE: July 31, 1978

PRESENT: Jack J. Barnett, Imogene Keene, Clarance "Andy" Anderson.

TRANSCRIBED BY: Estralita Bennett, State Attorney's Office.

MR. BARNETT: Okay, now Andy I want you to look right in my left eye. I want you to gaze in my left eye in a vague dreamy sort of way and have but one thought on your mind. Deep.... relaxing sleep. While you're looking in my eye now your eyes will get tireder and tireder. Your lids will get heavier and heavier. Soon your arms, your legs may begin to get heavy but as they do they will begin to relax and soon all of those muscles through out your body from the top of your head to the bottom of your feet will relax and become more and more relaxed. Your eyes now will get tireder and tireder. Your lids heavier and heavier. Soon your eyes will get so tired that you can not keep them open any longer and when you can not keep them open any longer you will just let your eyes close and when they close you will go into hypnosis. Now, even now your eyes are getting tireder and tireder. Your lids are getting heavier and heavier, they're beginning to blink more and more. Soon your eyes may begin to water or tear. As they do you will get drowsier and drowsier....drowsier and drowsier...tireder and tiredier. Those eyes are now getting so tired ti would feel nice to close them but I don't want you to close them yet. I'm going to begin counting and on or before I reach the count of 20 those eyes will become so tired that you cannot keep them open any longer, they will close and when they do you will go into hypnosis. One, two, tireder and tireder, heavier and heavier, and drowsier and drowsier three, four, tireder still...heavier and heavier, five, six, beginning to relax. More and more, eyes beginning to blink, seven, eight, struggling to keep them open.

Appx. C)

Getting tireder and tireder. The lids are beginni
to droop. Getting tireder and tireder. Nine, ten,
drowsier and drowsier, tireder and tireder, breathi
becoming deeper and deeper, eleven, twelve, tireder
and tireder and tireder. Lids heavier and heavier,
heavier and heavier, thirteen, fourteen, tireder an
tireder...lids blinking more and more...more and mo
eyes beginning to droop, fifteen, sixteen, tireder
tireder...tireder and tireder...drowsier and drowsi
seventeen, eighteen...eyes narrowing down to a litt
slits now...getting heavier and heavier..heavier and
heavier...tireder and tireder..nineteen, twenty. An
just let those eyes close and as they close now you'
relaxing...deeply relaxed now. Hypnotized now but y
can go even deeper now...deeper and deeper. I'm goi
to count to ten and as I do I want you to count back
to yourself. From ten to one. And with each count t
we take you will go deeper and deeper....deeper and
now. When I reach the count of ten and you reach the
count of one, you will just let yourself go completel
into a deep and total state of relaxation. One, deep
and deeper, sinking deeper and deeper with each count
two, deeper and deeper...deeper and deeper, three, de
still...deeper and deeper, four deeper yet, five...
deeper and deeper sinking deeper with each count but
no matter how deeply you go you will always hear my vo
and do exactly as I say cause everything will be for
your benefit...six, deeper and deeper now, deeper and
deeper, seven, deeper and deeper...deeper and deeper,
eight...deeper and deeper..deeper and deeper, nine...
deeper yet...deeper and deeper now on this next count
just let go completely..ten...just let go now deeply
relaxed. Deeply relaxed...deeply hynotized now. You'r
very relaxed all over now those now are peacfully close
tightly closed. Right now you wouldn't open even if
you could because they feel so peacfully and tightly
closed. In just a moment I'm going to ask you to try
to open your eyes but you will not be able. I'm going

to count to three and when I reach the count of
I will ask you to try to open your eyes but you
be able to. It will be as if your eyes are glue
tightly shut, as if you forgot which muscle contr
your eyes. You might raise your brows but you wi
be able to raise your lids because a different se
muscles controls those eyelids. In fact as I beg
counting your eyes will become tighter and tighter
Tighter and tighter with each count and when I rea
count of three they'll be so tightly shut/you cann that
open them. Ready now, one tighter and tighter now.
tighter and tighter...tighter and tighter now...tw
tighter and tighter...eyes tightly closed and you
open them...tightly closed now and you cannot open
three, now your eyes are tightly shut...tightly shu
you cannot open them. You try but you cannot. That
it now just relax. You see those don't open now and
go deeper and deeper now... just relax..just relax..
very nicely relaxed...very nicely hypnotized...you'r
doing very good now Andy, very pleased. We're pleas
with how you're doing and you have every reason to be
pleased with yourself now. I'm going to take your ri
hand and arm and although it's very deeply relaxed I'
going to raise it and I'm going to begin counting to
three and as I begin counting, the muscles in this arm
are going to tighten up and they will become tighter a
tighter, stiffer and stiffer with each count and when
reach the count of three, your arm will be stiff and
rigid....stiff and rigid, just like a board..like a ba
of steel and you will be unable to raise, unable to
lower, unable to bend it, it will be stiff and rigid ju
like a board, like a bar of steel. Ready now, one, tig
and tighter now...muscles getting tighter and tighter,
tighter and tighter....tighter and tighter and three no
Stiff and rigid...stiff and rigid...just like a board...
like a bar of steel. unable to raise unable to lower it.
In fact now, if I press on your arm, it will just bounce
back up. Stiff and rigid...stiff and rigid. Okay, now

I'm going to count to three and relax all those muscles
One, two, three....they're going to loose and light....
loose and light...completely relaxed. Now you can bend
your arm. It's very loose and limp...very relaxed now.
Now hold it over your lap and when I release it, that
hand is going to drop just like a wet dishrag. Just li
a rock right into your lap and as it falls you're going
to go deeper and deeper into hypnosis...deeper and deepe
...deeper and deeper....now...deeper and deeper....very
Your other hand I will.....hold over your lap and as i
drops you will go even deeper now. Deeper and deeper...
deeper and deeper....all the way...you're doing very
nicely Andy. Now I'm going to lift both of these hands
and I'm going to start them in a circular motion.....
round and around...they will go round and around and con-
tinue going round and around even when I stop helping you
And you will be powerless to stop them. Round and around
.....Round and around...round and around...round and
around....round and around and you're powerless to stop
them...round and around...round and around...round and
around...round and around...very good and now I stope
them. Hands and arms go loose and limp, completely
relaxed now. And as they drop you go deeper and deeper
now...deeper and deeper...deeper and deeper..deeper and
deeper...deeper and deeper. Now you're doing very nicely.
Going deeper and deeper all the time...deeper and deeper...
deeper and deeper..deeper and deeper...just let yourself
go now deeper and deeper...deep sleep. Deep sleep...
deep sleep...as you hear my voice you will sink deeper
and deeper...deeper and deeper into a very deep relaxing
state of mind...going deeper and deeper....deeper and
deeper but will always hear my voice now and do exactly
as I say....obeying my voice implicitly now...sinking
deeper....deeper and deeper...deeper and deeper.....
I want you visualize a tall building Andy....visualize
a tall building and see yourself say on the twelth floor..
see yourself walking down the hallway to the elevator....

A40

See yourself pushing a button and pressing for the elevators and see the doors opening and you walk on the elevator and you are alone, by yourself, you turn around and look at the indicator and it shows your ar on the twelth floor. Now see yourself pushing the button, closing the door, pressing the down button an see yourself slowly descending passing through each floor as you descend that elevator, going down to the first floor and you're sinking deeper and deeper as you pass through each floor and when you reach the bot floor, the first floor, you will just let go completel into an even deeper state of hypnosis. Sinking deeper and deeper now...deeper and deeper.... deeper and deep as you pass through each floor. Deeper and deeper.... deeper anddeeper.....deeper and deeper and when you ha reached the first floor indicate that to me by lifting the index finger on your right hand. Sinking deeper an deeper now. Deeper and deeper and when you reach the first floor you will just let go. Deeper and deeper no ....deeper and deeper...very good now...very good, okay. Now put that image out of your mind. Now in just a moment I'm going to take you back in time to a very pleasant time in your life...very very pleasant time in your life. I'm going to count to five and when I begin counting it will be as if the pages of the calender are flipping back. You will see this in your mind like the pages of the calender are being flipped back and you will go back in time as I begin counting with each count and when I reach the count of five, you will arrive at a very pleasant time in your life...a very pleasant time of your subconscious' own choosing. As I begin counting now you will go back in time and when I reach the count of five you will arrive at a very pleasant time in your live of your own choosing. And you will relive that vividly. Even though you are hypnotized you will be able to talk to me and tell me what you are experiencing. Okay. /Ready now one, going back now, going back, pages of the calender

are flipping back and you're going back in time. Tw
further and further back now. Three, further back,
further back now.. Four, further still now and Five
Now you are arriving at a very pleasant time in your
life. You are at a very pleasant time in your life
Able to relive it, recall it vividly. I want you to
tell me where you are? What you are experiencing ri
now?

MR. ANDERSON: We're at home, it's Sunday morning, we're fixing to
hunting. My brother, father, dog _____; over in
dog pen. Is the dogs in the truck? _____
_____. Straight t
the swamp. There's a swamp. Got some good dogs.

MR. BARNETT: Okay, how old are you Andy?

MR. ANDERSON: Fifteen.

MR. BARNETT: Fifteen? You say you're with your father?

MR. ANDERSON: Hm-ah.

MR. BARNETT: Alright. And you are with your brother?

MR. ANDERSON: Danny.

MR. BARNETT: Your brother Danny?

MR. ANDERSON: Hm-ah.

MR. BARNETT: How old is Danny?

MR. ANDERSON: He's thirteen.

MR. BARNETT: Thirteen. What are you doing right this minute?

MR. ANDERSON: Riding in the cab.

MR. BARNETT: You are in the cab of the truck?

MR. ANDERSON: Yes sir. My father's driving and we're going down 27
_____.

MR. BARNETT: Apparently this is a very pleasant time in your life.
can see that you are enjoying it by the smile on your f

MR. ANDERSON: _____ swamp. (Inaudible)Started driving down _____
looking for tracks.

MR. BARNETT: Is that what you're doing now?

MR. ANDERSON: Hm-ah.

MR. BARNETT: Okay. Are you seeing any tracks?

MR. ANDERSON: Yeah....

MR. BARNETT: What do you see?

A42

MR. ANDERSON: Looks like a sow and some _____. Fresh tracks. (Inaudible) Turn loose.....the trail_____ (Inaudible).....scouting. On boths sides of the road working the tracks. _____ track the trail you can hear them, they're...hotter the scent gets the more excited the barking gets.

MR. BARNETT: Okay and what are you doing now?

MR. ANDERSON: Well, just listening to the dogs run, they haven't reall started chasing the hogs yet. They're still trailing. In a little while they should.....as fresh as the tracks are they should strike soon.

MR. BARNETT: You enjoying being with your father and brother hunting, don't you?

MR. ANDERSON: Oh, yeah.

MR. BARNETT: Okay now, even though this is a very pleasant time in your life and you're enjoying it right now, I'm going to have to take you away from it. Maybe we can revisit this again some other time but right now I'm going to take you away....very satisfied with where you are and how you're doing. Now when I count to five I'm going to bring you back to the present time where we started. When I reach the count of five you will arrive back at the present time where we started but you will still be deeply hypnotized. As I begin counting it will be now as the pages of the calender flipping forward and as you see them flipping forward you will go forward in time and when I reach the count of five you will arrive right back where we started but still deeply hypnotized. Still in your deep hypnotic trance. Prehaps even deeper...even deeper as I begin counting now....one, going forward...forward in time now... two, further and further forward now, three, further forward, four...-further forward now and FIVE now, right back in the present time. Right here with me. You're doing very nicely...you're deeply relaxed .....-deeply hypnotized...very deeply relaxed..and deeply hypnotized.....but even though you are deeply

hypnotized you will be able to recall what we have done. Now just for a moment I want you to tell me where you are and what you're doing at this instanc

MR. ANDERSON: Tyson Auditorium talking to Jack and listening. I'm under hypnosis.

MR. BARNETT: And what is your name?

MR. ANDERSON: Andy Anderson.

MR. BARNETT: And Andy where did you just go?

MR. ANDERSON: Went hunting with my father.

MR. BARNETT: When?

MR. ANDERSON: Ahhh...

MR. BARNETT: How long ago?

MR. ANDERSON: 22...23 years ago.

MR. BARNETT: It's a great experience to go back to that time?

MR. ANDERSON: Hm-ah.

MR. BARNETT: Alright. Now, I'm going to take you on another experience. This time when I count to five you are going back in time again. But this time you are going back to a day in your life, earlier this year, when yo saw someone pick up a girl at the Lake City Junior Hig School, here in Lake City. Before I hypnotized we tal about this. You were able to recall it to some extent but not very much. Now when I begin counting you are going back to that day and relive it and tell me as much as you can about what happened on that day. You will relive this experience just the same way you reliv that trip back in the past on the hunting trip with you father and brother. You will relive it just as vividly. Ready now as I begin counting now you will go back in time....back in time to that day arriving at that day when I reach the count of five. It will be as if the pages of the calender are flipping back to that date. The day that you saw something....the day that you want to try to learn more about. Alright, ready now, one, pages of the calender are flipping back, you're going bac in time, two...back and back...three...further back now, four....and FIVE....five...now you arrive at that day

earlier this year, when you saw a girl being picked up at the Junior High School. Tell me about that day. What do you see right now?

MR. ANDERSON: I'm at the station drinking coffee. On coming shift.. my shift is coming on...day shift is going off..... 8:15 we're drinking coffee and start doing our chores. Start checking on...drug cabinet...I've assigned everybody work detail...check out the drug cabinet...I've been on...been at the station all night. I need a shower and a shave. I asked the assistant chief if it be oaky if I run home, change clothes and shower.... he asked me if there was another paramedic on duty and I told him yes, Robert Dortch. I go out to my truck get to West Duval Street...there's a van parked in the street, I pull up behind it. I notice a man and a girl on my left in the yard of the junior high school.... the girl's about 12 or 13, maybe 14. She's got black hair or very dark brown hair, shoulder length, parted in the middle. The guy's got her by her left arm just above the elbow, she looks unhappy. I think it looks like a father with a daughter....he doesn't look happy either. They wait for a car to pass, they cross the street, walks in front of the van, he opens the door for her and helps her get in the van. The guy's average height...average build...got on a white jacket or a white pullover jersey...it's light....I don't notice, I can't remember the pants....he wears his hair full, it's not long it's a full modern like it's styled.... it's medium to dark brown, it's wavy, not curly but just kind of wavy, nice hair. He puts the girl in the passenger side of the van and slams the door and he runs to the driver's side and they drive off. Not exceptiona fast, you know just like anybody else would. Ah..... traffic picks up and I follow them down to ah.....Seven Street. The van's got rear windows in both doors. It's a white van...a Chevrolet, I think...and it appears that the man is scolding the girl...I can't see the girl at

all. They continue to w..ere Duval Street and U.S
divide and I lose sight of them. I continue on h
ask my wife to iron me a shirt, I take a shower,
finish my shower, eat a piece of my baby girl's b
day cake and go back to work. That's all I can re

MR. BARNETT: Okay now when I count to three you're going back t
point where you are sitting in your truck behind t
and as I count now you're going to go even deeper
hypnosis than you are now. And you will have vivi
for what you see. Ready, now, one, two, three. No
want you to describe that van to me as you see it.

MR. ANDERSON: It's a white late model van. Ah....All I can see i
back of it....it's got glass in both rear doors...

MR. BARNETT: Can you see the license's plate?

MR. ANDERSON: Yeah...

MR. BARNETT: What do you see?

MR. ANDERSON: It's a Florida tag. I can't see the numbers.

MR. BARNETT: Why can't you see the numbers?

MR. ANDERSON: The car behind it partially blocks it....

MR. BARNETT: Can you make out any part of the tag?

MR. ANDERSON: Just the top.

MR. BARNETT: How do you know it's a Florida Tag?

MR. ANDERSON: By the color.

MR. BARNETT: How much of the tag can you see? Describe how much y
can see and what you see?

MR. ANDERSON: Just about....maybe just a third of it...maybe not tha
much....I can make out Florida...or part of Florida...

MR. BARNETT: Can you see any numbers?

MR. ANDERSON: No.

MR. BARNETT: Alright now I'm going to count to three again and this
time as I count you're thoughts will be centered on the
man...the man that you see.....your thoughts, your eyes
will be centered on the man....I want you to describe
this man as clearly as you can. Ready now, one, two,
three. Describe the man.

MR. ANDERSON: He's fairly young, 29, 30, 31. Good looking...I can't
see his eyes, clean shaven, weighs about 160, 165 at the
most....

MR. BARNETT: What about his clothes?

MR. ANDERSON: He's got on a pullover, I don't know if it's a sweater a jersey but it's a pullover.

MR. BARNETT: Look at it closely, what do you see?

MR. ANDERSON: I think maybe he has a shirt underneath it.

MR. BARNETT: What about his trousers?

MR. ANDERSON: They're ..... I'm not sure.....

MR. BARNETT: What about his shoes?

MR. ANDERSON: I don't see his shoes. Or I don't notice his shoes fo some reason.

MR. BARNETT: Can you see the girl now?

MR. ANDERSON: Yeah.

MR. BARNETT: Describe the girl and what she has on.

MR. ANDERSON: She's got on a pullover jersey, football jersey, it's got some numbers on it...

MR. BARNETT: Can you make out the numbers?

MR. ANDERSON: One of them.

MR. BARNETT: What is it?

MR. ANDERSON: Three.

MR. BARNETT: Why do you say one of them? How many numbers?

MR. ANDERSON: There's two numbers...she's got something over the other one...

MR. BARNETT: Can you tell what it is?

MR. ANDERSON: Six or an eight or.....-

MR. BARNETT: What color is the jersey?

MR. ANDERSON: Dark blue.

MR. BARNETT: The ah.....object or item that is obscuring that other number, can you make out what it is or what color it is?

MR. ANDERSON: Dark brown pocketbook. check 3 is out!

MR. BARNETT: Can you tell me what day this is?

MR. ANDERSON: February the 9th.

MR. BARNETT: What year?

MR. ANDERSON: 1978.

MR. BARNETT: How do you know it's February the 9th?

MR. ANDERSON: Because I worked that day ah...February the 8th is my little girl's birthday. She had her birthday yesterday.

MR. BARNETT: Okay, very good. Okay now you've been doing very nicely but for the on...-for the time being I'm going to bring

you back to the present once again I will count to
and as I begin counting you will come forward to th
present time back in Tyson Auditorium. As I begin
counting it will be as the pages of the calendor are
flipping forward and when I reach the count of five
will arrive back in the present time in the Tyson Au
but still deeply hypnotized. Ready, one, going forw
two, further forward, three, four, FIVE. Right back
the present time now but deeply hypnotized...very dee
hypnotized and relaxed. Now in just a few minutes I
going to awake you but I when I awake you now Andy yo
will re.....have complete recall and memory for ever
thing that we did here today. You will have complete
memory for your hypnotic session. You will remember
the details that you discussed with me under hypnosis
I will awake you now by counting to five. I will begi
counting and as I begin counting you will begin to com
out of the depths of your trance and when I reach the
count of five your eyes will open and you will be wide
awake. You will be feeling very rested, very relaxed,
all of those muscles throughout your body that have bee
tired today will be very soothed, rested and relaxed.
That neck will be feeling good and you will awake with
a sense of well being and this sense of well being now
will go with you the rest of the day and help you feel
very cheerful about what we've done today. Okay, now
ready to awake Andy, one, begin to arouse yourself, two,
three, four and FIVE. Now, open your eyes, open your
eyes now...Wide awake feeling good.

MR. ANDERSON: Ahhhh...

MR. BARNETT: Okay, how do you feel?

MR. ANDERSON: Okay.

MR. BARNETT: Okay, how do you feel about the whole session?

MR. ANDERSON: Still not clear...every...the scene. Some of the
things you asked me like the guy's trousers. I still
don't know the color of this trousers. Ah...the shirt
I know now it's a pullover, it's grey or it's light...

I think it's grey or a tan, maybe.

MR. BARNETT: Alright, did you feel like you were there, did you like you were seeing it? Or did you feel like you recalling it?

MR. ANDERSON: Parts I could see, parts I was recalling ah....the I could see, not the numbers. I know it was a Flor tag. I could see the tag through the window of one the cars and the _____was parked just right t block it off.

MR. BARNETT: Now I didn't ask you, you know, we can always think things that we could have asked but I didn't ask you could you make out that car? What kind of car it wa: Could you see the tag on it or anything?

MR. ANDERSON: It's a dark blue Datsun or Toyota.

MR. BARNETT: Could you see the tag on it?

MR. ANDERSON: No, the older car was a green car was directly behin

MR. BARNETT: Directly behind it and right in front of you?

MR. ANDERSON: There are those two cars.

MR. BARNETT: Okay.

MR. ANDERSON: And there was a small car, a little dark blue one, Dat Toyota, Fiat something like that directly behind the v then an old Pontiac. An old green bat up Pontiac.

MR. BARNETT: How do you know that?

MS. KEENE: About what year?

MR. ANDERSON: The way the back was made _____.

MR. BARNETT: Alright you didn't know that before.

MR. ANDERSON: No, it just dawned on me just now.

MR. BARNETT: Alright, could you see the tag on it?

MR. ANDERSON: No.

MR. BARNETT: Why?

MR. ANDERSON: I think because I was too close on it.

MR. BARNETT: Okay.

MS. KEENE: Maybe he just subconscuously noticed them. Did you see any cars passing by as you were reliving it?

MR. ANDERSON: Yes.

MS. KEENE: Anything that you had not thought of before and....describe them or.....

MR. ANDERSON: One's a white Chevrolet, I think one of the oncoming

cars. Ah....I can't remember the other one.

MS. KEENE: Hm....see anybody that you knew or (inaudible)

MR. BARNETT: Did you see anything under hypnosis that you recall more vividly now than you had before?

MR. ANDERSON: The girl's jersey.

MR. BARNETT: Okay. Now when I took you back to the ah...pleasant time in your life with your father and your brother hunting. How was that?

MR. ANDERSON: It was great, it was like I was there almost.

MR. BARNETT: Okay. Was that experience more vivid than the one we took you back to where you saw.....?

MR. ANDERSON: Yeah.

MR. BARNETT: It was more vivid. Okay....ah.....is there anything that you can tell us that would acount for why it was more vivid?

MR. ANDERSON: (no response)

MR. BARNETT: What did you think about the ah.....hypnotic session in general?

MR. ANDERSON: I liked the session.

MR. BARNETT: How does you neck feel?

MR. ANDERSON: Good.....(inaudible)

MR. BARNETT: Okay, you were amused by some of the challenges that I gave you. I could see a big smile come on your face. I made you hands stiff and rigid and I made your hands go around (inaudible)

MR. ANDERSON: Yeah, I remember thinking to myself, the damn thing is working.

MS. KEENE: Yeah. IT REALLY DOES WORK.

MR. ANDERSON: Before when she did it, _____. I just really didn't.....I wasn't convinced I was hypnotized.

MS. KEENE: Right it was not the atmosphere of to...to do it in.

MR. ANDERSON: Hm-ah.

MR. BARNETT: Are you convinced now?

MR. ANDERSON: Hm-ah.

MR. BARNETT: Okay. Ah....lots of times hypnosis improves with condition; today

MS. KEENE: Hmm..you're a better subject/because.....-

MR. BARNETT: In other words you're a better subject today because you

AJC

were hypnotized before. You've been exposed to it some now. We could probably hypnotize you again in a few days and maybe even get better results. It's possible you know we can do this again and ah.....and particular if they have any questions ah...we might explore them again under hypnosis.

MR. ANDERSON: Hmmm

MR. BARNETT: Would you be agreeable to that?

MR. ANDERSON: Sure.

MR. BARNETT: Okay.

MS. KEENE: You'd get those neck muscles relaxed anyway. Uh?

MR. ANDERSON: Worth the trip over here just to get my neck relaxed.

MS. KEENE: Yeah.

(END OF HYPNOSIS SESSION)

MR. AFRICANO: Your Honor, before Mr. Anderson comes in, may we approach the bench?

THE COURT: All right.

(Whereupon, a side bar conference was had between the counsel and the Court outside the hearing of the jury and on the record as follows:)

MR. AFRICANO: I would appreciate it if you would read the exhibit attached.

THE COURT: Mr. Dekle, the second motion to suppress testimony of certain witnesses who were called and affected and altered by hypnosis, filed by the defendant, together with a resolution of the National Society of Hypnosis, is denied.

(Whereupon, the foregoing discussion at the bench, which was held outside the hearing of the jury, was concluded and the following proceedings occurred within the hearing of the jury:)

THE CLERK: Do you solemnly swear the testimony you are about to give in this cause at this time shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

Thereupon,

CLARENCE LYNN ANDERSON, JR.

having been produced and first administered the above oath,

testified as follows:

DIRECT EXAMINATION

BY MR. BLAIR:

Q Would you tell us your full name and address?

A Clarence Lynn Anderson, Jr. I live at Route 5, Box 394-A, Lake City, Florida.

Q And where do you work, Mr. Anderson?

A I work for Occidental Chemical Company.

Q And what type of work do you do for Occidental?

A Right now, I'm in maintenance, and I also do some teaching in the safety department.

Q How long have you worked for Occidental?

A Five months.

Q And where did you work prior to that time?

A I worked for Dave E. McKee Construction Company.

Q And how long did you work in that capacity?

A I worked approximately six or seven months.

Q Okay. And prior to that, where did you work?

A Lake City Fire Department.

Q And what was your position at the time of your termination with the Lake City Fire Department?

A I was a lieutenant paramedic.

Q Briefly, what did your duties as a lieutenant paramedic entail?

A I'm director of firefighting. I assign all of the

men to work details. Also, rode rescue on all emergency runs. Basically, that's it.

Q In the course of your duties as a lieutenant in, with the fire department, were you called upon to direct or supervise the activities of other employees of the fire department?

A Yes, sir.

Q Is that a regular part of your duties?

A Yes, sir.

Q Were you employed as a lieutenant with the Lake City Fire Department in February of 1978?

A Yes, sir.

Q Directing your attention to the date of, or the night of February the 8th of 1978, were you working on that night?

A Yes, sir. I was on overtime. We were very short of manpower and, when we had a fire or a rescue unit leave the station, off-duty men were called in to replace the duty men.

Q Were you scheduled to have been off duty that night?

A Yes, sir.

Q Were you called back to the station?

A Yes, sir, several stations during that day.

Q Where did you spend the night of February the 8th?

A At the fire station.

Q Did you have occasion to leave the fire station on the morning of February the 9th?

A Yes, sir, I did.

Q And for what reason did you leave the fire station at that time?

A I needed to change clothes. I needed to shower and shave.

Q Did you, in fact, leave the fire station?

A Yes, sir, I did.

Q And what time did you leave the Lake City fire station on the morning of February the 9th?

A Sometime around nine or nine-fifteen, something like that.

Q How can you establish that in your mind as the time that you left the fire station?

A Recalling the duties that you perform the first thing in the morning, eight o'clock to eight-fifteen is normally kind of a coffee break. The on-duty shift is going off. The oncoming shift is coming in. And you sit around and drink coffee and discuss anything that's pertinent.

After eight-fifteen, I assign men of my crew to work details and assign the men that are supposed to ride fire and put them on fire patrol, the guys that ride rescue, put those guys on rescue detail. Then I check out our drug cabinet and the radios in the drug cabinet, the fibrillators

in the drug cabinet. Then we usually check on the men and make sure they are doing the work they are assigned to do.

Q And the duties that you have described, are they normally performed between the hours of eight and nine each morning when you were on duty?

A Yes, sir.

Q All right. As you left the fire station sometime between nine and nine-fifteen on the morning of February the 9th, in what direction did you proceed?

A I was going west on U.S. 90 or Duval Street.

Q And does U.S. 90 or Duval Street, did your route take you in front of Lake City Junior High School?

A Yes, sir, it did.

Q Mr. Anderson, I'm going to direct your attention to an aerial photograph, which has been identified as being an aerial photograph depicting Lake City Junior High School. I ask you if you will come down from the witness stand and identify the route that you took on the morning of February the 9th.

A (The witness left the stand.) Okay. Give me a second so I can get my bearings here as to where the fire station is.

I'm sorry. I'm having a little bit of a problem finding the fire station.

Q All right. Representing to you that other witnesses

have testified that from left to right is from east to west, does that help you with your bearings?

A Yes, sir. This is going west?

Q That would be going east, I believe.

A This is going east?

MR. AFRICANO: Your Honor, I'm going to object to Mr. Balir telling the witness how to testify on what the other witness testified to.

THE COURT: He is not telling him what to testify. He is just orienting him. But I will sustain the objection.

THE WITNESS: I have never seen Lake City from the air.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Mr. Anderson, would it refresh your recollection if I showed you a map that you had previously identified--

A Yes, sir.

Q --as depicting the high school area? Do you think it would refresh your recollection?

A Yes, sir.

Q I ask you to examine that map, sir, if you will compare it to the aerial photograph and tell us whether or not that refreshes your recollection as to your route of travel on the morning of February the 9th.

A Yes, sir.

MR. AFRICANO: Your Honor, before he testifies any further, may we have what he has refreshed his recollection from marked for identification, please?

THE COURT: It may be so marked as State's Exhibit for Identification, the next number.

MR. THOMPSON: Madam Clerk, what number is that?

THE CLERK: I.

THE COURT: I.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Mr. Anderson, can you identify this map that you have previously used to refresh your recollection as fairly and accurately depicting the location of the various buildings in the Lake City Junior High School complex as it existed on February the 9th?

A Yes, sir.

MR. BLAIR: Your Honor, at this time, the State would offer this into evidence as State's Exhibit--

THE COURT: I know, 3.

MR. REGISTER: 3.

THE COURT: Any objection?

MR. AFRICANO: No objection.

THE COURT: Let it be received in evidence as State's Exhibit Number 3.

MR. BLAIR: Thank you, Your Honor.

THE CLERK: State's Exhibit I in evidence as State's Exhibit Number 3.

(Whereupon, State's Exhibit Number 3 was received in evidence.)

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Okay. Mr. Anderson, would you tell us where the fire station was located in relation to the buildings depicted on that aerial photograph?

A Okay. This is the junior high here, is it not? The fore station would have been, I don't see it in the aerial photo. It would have been somewhere in this area right here.

Q Somewhere off of the lower left corner of that photograph?

A Yes, sir.

Q And what was your route of travel that took you past the junior high school on the morning of February the 9th?

A It was heading west on this street here.

Q And what street is that?

A U.S. 90 or West Duval Street.

Q Okay. Would you take the witness stand again, please?

A (The witness returned to the stand.)

Q And approximately what time would you have passed

in front of the Lake City Junior High School after leaving the fire station on the morning of February the 9th?

A Nine-ten or nine-fifteen, thereabouts.

Q What, if anything, did you observe in the vicinity of Lake City Junior High School on that morning as you travelled to your home?

A The first thing I noticed was there was a white van parked in the westbound lane of Duval Street, that, as I apporached it, several cars had, were going around it. There were still two cars behind the van and then my truck. And I was sitting there waiting for the truck to move or waiting for traffic to clear so I could go around it. And on my left, I noticed a young girl, approximately twelve or thirteen years old, dark hair, shoulder length, parted in the middle. Probably the only reason I noticed this girl was she looked very much like one of my nieces.

Q Was there anyone with the young girl?

A Yes, sir. With her was a man, approximately early thirties, had brown hair, you know, light to dark brown hair, was full cut of hair. It was one of the things that I really paid any attention to as far as the man was concerned. It was kind of wavy, but it was full cut, you know, really a nice head of hair.

I got the impression that the young girl was either crying or had been crying. The man had a scowl on his face.

And I felt like probably the girl had gotten in trouble at the school or misbehaved in some way and had called her father to come pick her up and take her home. And as I was sitting there, watching them, I remember thinking to myself, you know, the daddy is going to take the little girl home and probably, you know, give her a spanking or something like that.

Q Would you tell us how the girl was dressed, as you recall?

A She was wearing a pullover football jersey and probably dungarees.

Q What was the color of the football jersey?

A It was dark blue.

Q Did the jersey have any distinguishing marks or characteristics?

A Yes, sir. It had some letters on it, "63" or "68", red-orange, something like that.

Q Did the girl appear to be carrying anything?

A Yes, sir. In her left arm, kind of clutched to her chest like this (demonstrating), was a medium-sized object like, so it could have have been a pocketbook or a rolled-up jacket or maybe both. I don't know. The man had her by her left arm, right about the elbow, and he was leading her towards the white van. The little girl was not actually resisting. It was pretty evidence that, that, you know, she

wasn't really anxious to go. They was, from the sidewalk, probably six to ten feet from the sidewalk when I first saw them. They continued to walk to the sidewalk. He stopped--

Q Did the man have the girl by the left arm during the entire time that you observed them?

A Yes, sir. They stopped and a car came by, going east, and they crossed in front of the white van. The man opened the door.

Q Which door did he open?

A The door on the passenger side. And helped the girl get in the van, slammed the door, and kind of jogged in front of the van, got in the passenger side, and they drove off.

Q Okay. Mr. Anderson, I'm going to ask you, if you will, one more time, to step down from the witness stand and, utilizing the aerial photograph, to demonstrate for the benefit of the members of the jury where you were parked and where the white van was parked and where the two individuals that you have described were observed.

A (The witness left the stand.) Okay. I was parked somewhere in this area here. The white van was parked approximately right here.

Q All right. Now, just for the record, in which direction were you headed at that time?

A I was going west.

Q And in which direction was the white van?

A It was going west.

MR. AFRICANO: If I might interrupt one moment, for the purposes of later discussion, could we please have Mr. Anderson mark that exhibit?

THE COURT: Yes, sir.

Would you mark with an X mark?

MR. AFRICANO: Is there a red pencil or something so it's more visible, please?

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Let me ask you to do this. Mr. Anderson, depict on the aerial photograph, if you will, the location of your van or your vehicle and mark that "A", if you would.

A Okay. (The witness complied with the request.) And the white van was approximately right here.

Q Okay. Mark the location of the white van, if you will, and indicate that with the letter "B".

A (The witness complied with the request.)

Q Now, if you would point on the aerial photograph the location of the man and the boy when you first observed them headed toward the white van.

THE COURT: The man and the boy?

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q I'm sorry. The man and the girl.

A Approximately right here.

Q And would you indicate that with the letter "C", please?

A (The witness complied with the request.)

MR. AFRICANO: Judge, it's really almost impossible to see. Perhaps the rest of the jury can't see. If we use Mr. Blair's yellow pencil, it might stand out a little bit.

THE COURT: All right.

MR. AFRICANO: Thank you.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q If you would just highlight the A, B and C with the yellow felt tip pen, if you will, and perhaps that will be adequate.

A (The witness complied with the request.) It doesn't show up as well as the red.

MR. AFRICANO: Have you got black?

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Let's try it again, Mr. Anderson, using the latest black felt tip pen used for that purpose. Would you indicate the letter "A"--

A (The witness complied with the request.)

A64

UNIDENTIFIED JUROR: Now, you can see that.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q --the letter "B", representing the location of the white van, and the letter "C", representing the approximate position of the man and the young girl when you first observed them?

A (The witness complied with the request.)

Q Thank you.

A (The witness returned to the stand.)

Q Were you able to tell how the man was dressed?

A Yes, sir. He had a pullover sweater, with a shirt underneath the sweater. I don't recall the exact color of either one of them. The sweater was a neutral color, tan, light grey, something like that. I don't recall the color of his trousers.

Q You have described the van as being a white van. Can you give any further description of it, particularly with respect to any windows?

A All I seen was a, was the very back of it and it had two windows, the rear doors.

Q Okay. I'm going to hand you a photograph, which has been marked for identification as State's Exhibit J. I ask you to examine this photograph and tell us whether or not that photograph is similar to the white van that you observed

on the morning of February the 9th in front of the Lake City Junior High School.

A Yes, sir, it's very similar.

Q Now, after the person placed the girl in the white van and got in on the driver's side, what happened then?

A The van drove off, you know, a normal rate of speed. As I said before, there were two vehicles between me and the van. The closest one to the van was a small, dark blue foreign car of some kind. I have no idea what kind.

Q Did you remain behind the white van?

A Yes, sir.

Q And approximately at what distance behind the white van?

A Two car lengths. We were all fairly close together. Nobody was keeping the proper distance between the vehicles, if I remember correctly. Somewhere between the junior high school and 7th Street, which is roughly seven blocks, six blocks, the small car turned off to the right. I don't recall what street it turned off. And then the van stopped at the red light at 7th Street.

Q Were you able to observe the driver as he was stopped at the red light there at 7th Street?

A Some. I could see through the rear window. I could see more of a silhouette than anything else. And he was turned to the passenger side, and I got the impression

he was--

MR. AFRICANO (interposing): Objection, Your Honor, as to his impression. Mr. Blair just asked him what he saw and he is volunteering an answer.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q All right. What, if anything, did the driver appear to be doing?

MR. AFRICANO: Objection. That calls for a conclusion.

THE COURT: Overruled. He can tell you what he observed.

MR. AFRICANO: He said he got the impression and that is an impression. He can say what he saw, but not his impression of what he saw characterized.

THE COURT: Tell us what you saw the driver doing, if you saw him doing anything.

THE WITNESS: Okay. When the van stopped at 7th Street, I could see the silhouette of the driver turn towards the passenger side.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Could you see anyone in the passenger side at that point in time?

A No, sir.

Q Had the girl been sitting up straight in the seat, do you know of any reason why you could not have seen her at that time?

A No, sir.

Q What, if anything, did you see the driver doing?

A He was gesturing, turned to his right, and moving his head like he was talking, and gesturing with his left hand.

Q And when you say he was turning to his right, that would have been toward the passenger side of the--

A Toward the passenger side.

Q How long after that did you lose sight of the van?

A Approximately two, two and a half blocks, U.S. 90 veers left and West Duval Street continues straight west.

Q Mr. Anderson, I'm going to hand you a photograph, which is in evidence as State's Exhibit 1, and I ask you to examine that photograph and tell the members of the jury whether or not you recognize that person depicted.

A Yes, sir, I do.

Q Who is that person?

A It's the young girl I saw at the school.

Q On the morning of February the 9th?

A Yes, sir.

Q I'm going to ask you, Mr. Anderson, if you will look around the courtroom and tell the members of the jury

whether or not you can positively identify the man that you observed leading that young girl from the school ground on February the 9th.

A No, sir, I'm not absolutely certain.

Q I ask you then to once again to look around the courtroom and tell the members of the jury whether or not there is anyone in the courtroom who closely resembles the person that you observed leading the young girl to the white van on the morning of February the 9th.

A Yes, sir, there is.

Q Would you point that person out, please?

A The defendant.

MR. AFRICANO: Your Honor, I would like the record to reflect that, on both occasions that Mr. Blair asked that question and directed Mr. Anderson to look around the courtroom, Mr. Anderson turned his head and immediately and directly looked at the defendant.

THE COURT: The jury can observe the witness' actions.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Are you aware of any physical dissimilarities between the person that you have identified in the courtroom and the person that you observed leading the young girl to the white van on the morning of February the 9th?

A Excuse me. Ask the question again.

Q I think you indicated that the person that you pointed out in the courtroom closely resembled the person that you saw leading the girl to the white van.

MR. BLAIR: And if the record does not reflect it, Your Honor, at this time, I would like for the record to reflect that the witness did point out the defendant in this case.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Are you aware of any dissimilarities in the appearance between the person that you pointed out in the courtroom and the person that you saw leading the girl to the van on that morning?

A No, sir, they were very much alike.

Q What was the weather like on the morning of February the 9th as you made these observations in front of Lake City Junior High School?

A I know it had been raining. I drive an old pick-up truck in winter and the window does not always roll up like it should, and I remember the seat being wet. It was probably cloudy, overcast. The sun came through. It was only briefly.

Q So far as you know, was it raining during the time that you made these observations?

A No, sir.

Q When did you first report what you had observed on the morning of February the 9th?

A July 28th, sir.

Q What incident led you to report it? Well, let me back up for a moment. Strike that.

Why did you not report it prior to that time?

A I didn't want to really be involved. I wasn't absolutely sure that I saw anything of, you know, any importance. I wasn't sure of any dates. I just knew that I saw a girl that looked like the Leach girl and was not sure exactly that I saw her, and mainly just not wanting to be involved, the biggest reason I didn't come forward.

Q Tell us again the date on which you finally reported what you had observed.

A July 28th.

Q And that would have been of 1978?

A Yes, sir.

Q And what, if anything, led you to report what you had observed on the date of July the 28th?

A Sitting at the fire station, drinking coffee, around eight o'clock, the news came on. One of the men on duty said, There is--

MR. AFRICANO (interposing): Objection to what one of the men said on duty, Your Honor. That would be

hearsay.

THE COURT: Sustained.

MR. AFRICANO: And in anticipation of what Mr. Anderson is going to testify to, may we approach the bench?

(Whereupon, a side bar conference was had between the counsel and the Court outside the hearing of the jury and on the record as follows:)

MR. AFRICANO: Your Honor, I didn't pick up the original. I have it over here. I couldn't find the date Your Honor signed that order. I apologize. We can fill it in.

THE COURT: The Court, having previously heard the motion to suppress, which is being renewed by his second motion here--

MR. AFRICANO: Your Honor, I would suggest to the Court that Mr. Anderson is not going to testify about the picture on TV for the same reasons, the identification made by him that the man he saw on TV was the man that he saw at school, it's hearsay, and I think it should be a proffer of his testimony before the jury is allowed to hear it, in the say way Mr. Edenfield's testimony was presented. And in addition and in light of the things advanced in chambers as far as himself, I would get it on the record that, a proffer, before he testifies

as to what he saw on TV and what was going on, because I am confident and I would represent to the Court that what he saw can and should be interpreted as part of a judicial proceeding.

THE COURT: Does the State wish to respond to that?

MR. BLAIR: Your Honor, I heard very little to respond to, but we rely upon the arguments that we previously made. This stuff is different material than the last witness here. Those are matters that enter as to his credibility. I'm sure that Mr. Africano will fully explore that on cross-examination.

MR. DEKLE: Also, if this came from any judicial proceeding, Your Honor, it could not possibly have been this judicial proceeding, because I think the record will reflect that an examination of the record will reflect that the indictment in this case was returned July the 27th, I believe, and this defendant was not transported to Lake City and did not engage in any judicial proceedings in this case until a couple of months later. What was it? September.

MR. AFRICANO: The indictment in this case was handed down July 20th. It was sealed until the indictment in Tallahassee was entered or read, was July 27th. I'm not, I don't know, Your Honor, unsealing the indictment on a certain date,

I don't know whether it was the 28th, that that was the broadcast, but the announcement of both indictments was contained in that. And I am confident that that's what Mr. Anderson had seen. Which one or both, I don't know.

(Whereupon, the foregoing discussion at the bench, which was held outside the hearing of the jury, was concluded and the following proceedings occurred within the hearing of the jury:)

THE COURT: We are going to take a recess for fifteen minutes. I'll meet with counsel in chambers.

(Whereupon, a recess was had at 10:50 o'clock A.M. and Court convened in chambers, after which the following proceedings occurred:)

THE COURT: All right, gentlemen. We are here to continue or to dispose of your objections to and your motion for voir-diring this witness' further testimony.

Now, Mr. Africano, let's review that and state out succinctly your motion and your request at this time.

MR. AFRICANO: Basically, as succinctly as possible, Your Honor, we would adopt the same argument we adopted with Mr. Edenfield with Mr. Anderson. What he is about to testify to is that he saw, is substantially, was directed to a picture on the TV by a comment of one of the firemen. He saw a picture of a man he states was

Mr. Bundy going in and out of the courtroom, and he saw a profile and that clicked in his mind and that's the man he saw with the little girl.

All right. It has not been established that the picture that he saw was, in fact, that of Mr. Bundy. The picture would speak for itself. We submit that the State should be required to come in, that Mr. Anderson identify that as being the picture that he saw. But for him to identify the picture that he saw as the man he saw and then to let the jury conclude that the man he saw was the defendant sitting at the table, again, as Mr. Thompson said before, they're missing a step. He is identifying the defendant through a picture and now saying, The man I saw with the little girl is the man I see today. But that's where he drew his recollection from and that's hearsay.

MR. DEKLE: Your Honor, the situation is not hearsay. It's analogous to a chance encounter on the street between a witness and a defendant. And you just can't characterize things as being hearsay. Under Mr. Africano's logic, if a witness were to see the defendant, say, in a chance encounter on the street, then he couldn't testify to that unless you could completely reconstruct the chance encounter on the street with what the appearance of the person he saw on the street.

The analogy, I think, is clear between this and a chance encounter on the street, and there is no hearsay element involved. And since this viewing was made at a time prior to the commencement of any judicial proceedings in this case involving the defendant, I don't believe the defendant was brought to Columbia County until some several weeks later, and I think the record will reflect that or will substantiate that this does not fall within the ambit of the Court's prior ruling about photographs or television representations of court proceedings in this case.

THE DEFENDANT: Your Honor, may I just momentarily--

The situation is also analogous to someone watching the Super Bowl on TV and seeing a crowd shot and seeing someone in that crowd he identifies or believes may resemble the person he saw. We don't know who was in that crowd. We don't know that the individual he saw is the defendant or is the person he now is identifying. And this is the reason it's hearsay and this is the reason the State must produce the film or the photograph of, this man is now saying sparked his memory of the incident, which had occurred five or more months earlier.

MR. BLAIR: Your Honor, this is different from even Mr. Edenfield's case. This witness has already

identified the defendant. Now, the question that I asked him was, What caused you to report this on July the 28th? Seeing him is what caused him to put it all together and say, Hey, that is the man, I've got to report it. And he has already identified. My question was directed solely in terms of, What caused you to report this?

THE COURT: The Court is trying to analogize. Suppose you were sitting in a restaurant and, two tables away, you saw a person and he was or she was talking to someone, and you heard his companion say, Why, Wallace Jopling, I'm glad to see you again now. And then you looked at the person and you said, I saw that person on such-and-such a time. Is that identification, in that fashion, inadmissible without bringing in the person who said the name? Is that your contention?

MR. AFRICANO: The identification of you as Wallace Jopling would be inadmissible because the statement made by that other person, Wallace Jopling, which led them to draw the conclusion that you were Wallace Jopling would be inadmissible as hearsay. What he is saying is that, I saw Mr. Bundy's picture on television. He is going to testify that there were a number of people on there and some audio saying Theodore Bundy being led to and from a courtroom, and that's how

he concludes the man in handcuffs was Theodore Bundy.

MR. BLAIR: If he testifies to that, it will be because you brought it out on cross-examination. All I contemplate him testifying is, I saw a television clip, I recognized that as the person, that's what led me to report it, to make me believe that was what I had seen.

MR. AFRICANO: The defense is being put into the position, based upon the Court's ruling, of developing on cross-examination that which we are seeking to suppress. We are between a rock and a hard place, because, if the kid is in, we are trying to develop what we are trying not to develop. We have to develop the hearsay aspect of it.

THE COURT: Well, it would seem to me that a television, or a telecast and an observation, that is almost like the spoken word. It's evaporated. Of course, they have in their voluminous files somewhere t that clip that he saw, no doubt, but to require that to be dug up and brought back and exhibited to me seems to be an unreasonable and unduly harsh requirement in view of the fact--

Do you want to listen to what I'm saying, Mr. Africano?

MR. AFRICANO: I'm listening, Your Honor.

THE COURT: Would be an unduly harsh requirement

when the identification has already been made and this is a matter of explanation of the connection between it. And therefore, I will overrule the objection and we will proceed when we return to court.

(Whereupon, the foregoing proceedings in chambers were concluded and a recess was had at 10:59 o'clock A.M. and Court reconvened in Courtroom E, Fourth Floor, at 11:07 o'clock A.M. in the presence of the jury, after which the following proceedings occurred:)

THE COURT: Mr. Blair, you may proceed.

MR. BLAIR: Thank you, Your Honor.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q Mr. Anderson, I believe my last question was, what prompted you to report what you had seen on July the 28th?

A Okay. We were having coffee. The news came on. A friend of mine called--

Q Don't tell us what anyone told you.

A I won't tell you what anyone said. Anyway, he called my attention to the TV and the person that was on TV just jumped out at me, bore a striking resemblance to the man that I saw at the junior high school with the girl.

Q And after making this observation on the television, what, if anything, did you do?

A I went and saw my chief and asked permission to go

to the police department. He gave me permission. I went and saw Chief Philpot.

Q And who is Chief Philpot?

A He is the chief of the Lake City Police Department.

Q And what happened after you saw Chief Philpot?

A I briefly told him what I had seen about the person on the newscast bore a striking resemblance to the man that I had seen with a girl that looked a lot like the Leach girl, and he, in turn, called Mr. Larry Daugherty.

Q And who is Mr. Larry Daugherty?

A He is an investigator with the Lake City Police Department.

Q And did Mr. Daugherty arrive on the scene?

A Yes, sir.

Q And what, if anything, happened after Mr. Daugherty arrived there?

A Chief Philpot asked me to repeat my story to Investigator Daugherty. I did. Then they called Mr. Bob Dekle, and then, a short period of time, Mr. Dekle came to the chief's office. I repeated my story to Mr. Dekle. And as soon as I repeated my story to Mr. Dekle, he asked me would I mind undergoing hypnosis to make my memory better.

Q Okay.

A To make things clear.

Q Thank you. Let me ask you this. Mr. Anderson, is there anything that you have testified to in court this morning that you did not recall at the time that you first related this to Mr. Dekle and to Mr. Daugherty and to Chief Philpot?

A Small things, but essentially the whole story is pretty much the same as then as it is now.

Q Okay. When you say small things, do you recall specifically what you later recalled and have testified to this morning that you did not tell them at that time?

A I believe I may have stated that the girl was wearing a dark pullover jersey and now I recall a football jersey and recall the letters. Other small items like that.

Q All right. At the time that you first reported this, what date do you believe that you had observed these things?

A I didn't know the date. I was guessing when I said sometime maybe around April. April, it just seemed like it might have been.

Q All right. Now, returning again to the statement that you made for Investigator Daugherty, Chief Philpot and Mr. Dekle, what happened after that statement?

A You mean--

Q What was the next thing that occurred?

A After I repeated it to Mr. Dekle?

Q Yes.

A They brought Mrs. Keene in. I don't recall her first name.

Q Do you know who Mrs. Keene is?

A I think she works in the VA Hospital. I'm not absolutely certain of that.

Q And do you know what her function was there that morning or why she was being brought in?

A Yeah. She was being brought in to hypnotize me.

Q Did you agree to undergo hypnosis?

A Yes, sir.

Q Did anyone force you to undergo hypnosis?

A No, sir.

Q And did Mrs. Keene, in fact, place you under hypnosis, so far as you were concerned?

A I was not absolutely convinced that I was hypnotized. I have never been hypnotized before and had nothing to go on, although it's very much more relaxed after she supposedly put me under hypnosis.

Q Do you recall anything as a result of that hypnotic session that you hadn't already told the, Investigator Daugherty, Mr. Dekle and Chief Philpot?

A I can't recall right now.

Q Let me ask you this. During the course of the hypnotic session, did Mrs. Keene or anyone else suggest any

answers to you?

A No, sir.

Q Did anyone tell you what to testify to or what to say during the hypnotic session?

A No, sir.

Q And that hypnotic session would have occurred on the same date of July the 28th?

A Yes, sir.

Q Did you undergo a second hypnotic session?

A Yes, sir, I did.

Q And what was the date of that?

A July the 31st.

Q That would have been three days later?

A Yes, sir.

Q In between the first hypnotic session and the second hypnotic session, were you able to recall the date upon which you had made the observation that you have described in court this morning--

A Yes, sir.

Q --at the school?

MR. AFRICANO: Objection, Your Honor. That's leading.

THE COURT: Overruled.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q And what date did you recall at that time?

A After talking to Chief Philpot and Mr. Dekle and Mr. Daugherty, I went home.

Q Let me ask you this. You say after talking to them. Did any of them suggest a date to you?

A No, sir.

Q What instructions, if any, did you receive?

A They told me to go home and think about it, and I went home. I talked it over with my wife. I was very concerned about it, very upset about it. I didn't even know what day the girl went missing. I believe my wife said it was around the time of our little girl's birthday and then it began to dawn on me as I went over it in my mind that I saw the little girl and the man coming home from the fire department the day after my little girl's birthday.

Q What was your little daughter's birthday?

A February the 8th.

Q Had you planned any events in connection with her birthday or what caused you to focus attention on her birthday?

A My wife had planned a party where some of her friends and a movie, and I was looking forward to, you know, going to the party and taking the kids to the movies, you know, helping chaperone the kids. And I didn't make it because I was working overtime at the fire station. I got called in

quite often that day to work overtime. It seemed like every time I went home, I walked in the door, the phone would be ringing and them asking me to come back down to the fire station and, late that afternoon, I got a call to go back down to the fire station, they had a trip going to Gainesville, and we needed the money, so I went and I called my wife and told her that I'm sorry, go ahead and take the kids to the party and the movie, I wasn't going to be able to make it.

Q Okay. What, if anything, happened on February the 9th, after you got home, that allowed you to tie that incident in with your little daughter's birthday party?

A I remember going in. I remember feeling guilty about not being with the kids at the party. Well, the first thing I did was eat a piece of my daughter's birthday cake. I asked my wife to iron me a shirt, a uniform shirt. I think probably eating the cake and just I remember feeling guilty about not making the party makes me remember it as clear as anything else.

Q Okay. And are you certain in your own mind, as you have testified this morning, on February the 9th is the date that you made those observations that you have described to the Court?

A Yes, sir.

Q Now, do I understand your testimony to be that, in

between July the 28th and July the 31st, you made this determination?

A Yes, sir.

Q All right. Tell us what happened, if you will, on July the 31st.

A I was hypnotized by Mr. Burnette, I believe.

Q Do you know who Mr. Burnette is?

A Not exactly. I think he works with the VA Hospital, also, I think maybe in the social work of some kind.

Q And during this hypnotic session, were you able to recall things that you had not recalled during the first hypnotic session and things that you had not reported to Investigator Daugherty, Chief Philpot, and Mr. Dekle on February 28th?

MR. AFRICANO: Your Honor, I object to that. The hypnotic sessions speak for themselves unless he can testify that he remembers what he was recalling while under hypnosis.

THE COURT: I thought that's what he was asking him. Overruled.

THE WITNESS: Yes, sir, I recall small things, I believe, at this time. I recall that, I recall the letters on the jersey the girl was wearing.

DIRECT EXAMINATION (CONTINUED)

BY MR. BLAIR:

Q The numbers?

A The numbers. I'm sorry. I recall the letters, the numbers. There are probably several small other things that I recall. I think I came closer to remembering exactly what the man was wearing as far as it being a pullover sweater and a shirt.

Q Let me ask you this. Did anyone suggest to you, Mr. Burnette or anyone else, during the course of that second hypnotic session, what the girl was wearing or what the letters were on her jersey or what the defendant was wearing?

A No, sir.

Q In your own mind, were you hypnotized the second hypnotic session?

A Yes, sir.

Q And it is your testimony that essentially all you recall as a result of the two sessions were perhaps that the football jersey was blue and that the numbers were, what was your testimony concerning the numbers?

A I believe the numbers was a "63" or a "68". One of the numbers was partially obscured by an object she was holding.

Q In arriving at the date of February the 9th as the date upon which you made these observations, did you consult any records at the fire department?

A No, sir.

Q Has anyone connected with the investigation or with the state attorney's office or otherwise suggested that date to you at any time?

A No, sir.

Q With respect to the records at the fire department, how do you sign, what is your signature on those records?

A C. L. Anderson.

MR. BLAIR: Nothing further of this witness at this time, Your Honor.

THE COURT: Mr. Africano?

CROSS-EXAMINATION

BY MR. AFRICANO:

Q Mr. Anderson.

A Mr. Africano.

Q You have testified that you did not come forward with this information until July 28th, 1978.

A Yes, sir.

Q All right. This would be approximately five months and three weeks after you now report that you recollect seeing this incident. Okay. Please tell me, if you will, sir, after having made your initial statement to Mr. Dekle, just what transpired between the several of you that were there that caused you to agree to give, to undergo hypnosis.

A I wanted to make absolutely sure that my memory was as clear as it could possibly be. I knew absolutely nothing

about it.

Q Okay. Let me back up for a minute. I realize that that's what you wanted to do, but was it told to you that hypnosis could possibly do this?

A Yes, sir.

Q Okay. Okay. The transcript or the statement that you made for Mr. Dekle ended, okay. Can you recall after the transcript ended, what was the conversation between yourself and Mr. Dekle, and who else was present? There was Investigator Daugherty present?

A Yes, sir. This is the first hypnotic session, right?

Q No, this is immediately after you gave your initial statement to Mr. Dekle after the sequence of events. As I recollect your testimony, you reported it to Chief Philpot.

A Right.

Q He then, in turn, sent you to Investigator Daugherty or called him in and you repeated it again. He then summoned Mr. Dekle, who came down and took a statement.

A Right.

Q Okay. Who was present when Mr. Dekle's initial statement was taken?

A Chief Philpot, Larry Daugherty, Mr. Dekle, and I'm really sure that was all.

Q Do you recall whether Paul Bryant, another assistant state attorney, might have been present?

A Possibly, yes, sir.

Q Okay. All right. Now, they were all present when you gave your statement to Mr. Dekle. Is that correct?

A Um-hum.

Q Okay. Now, that transcription, that statement is over and you get involved in discussing hypnosis. How was that brought up? Who suggested it to you?

A Mr. Dekle suggested it to me initially.

Q Would you mind telling me what he said?

A I can't recall, you know, verbatim what he said.

Q Well, to the best of your recollection. I understand.

A He explained that, you know, hypnosis would not make me remember anything that I did not actually see.

Q Well, he must have first asked you would you mind going under hypnosis before he started telling you.

A I was talking about already stated.

Q I'm trying to backtrack.

A Mr. Dekle asked me if I would mind undergoing hypnosis. I told him no, I would not mind. Then it seems like he explained a little bit about hypnosis and there was some discussion about he used self-hypnosis to help him in his work. I believe Larry Daugherty said something about

that he had tried hypnosis to stop him or to slow him down from swearing so much.

Q Did it help him at all?

A Not that I can tell.

Q Please continue.

A Then Mr. Dekle told me that it would just simply make me relive in my mind what I saw.

THE COURT: Will you speak up a little louder so all of the jurors can hear you, Mr. Hagen back there and the ladies on the end.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Mr. Dekle told you that it would make you relive in your mind what you saw on that occasion?

A Yes, sir. You know, that's not verbatim, but that was--

Q That was the impression you got. That was the understanding. Did you believe him?

A I wasn't absolutely sure.

Q Okay. And what happened then?

A The State called like Mrs. Keene in and--

Q Well, okay. I want to try and get this as close to the chronological order that it happened, Mr. Anderson, so, if I interrupt you, if I think there is something in between that you might recall, please excuse me.

A All right.

Q You agreed, then, to undergo hypnosis?

A Right.

Q Right. Was Miss Keene summoned while you were still there?

A Yes, sir.

Q Okay. Did you ever leave Mr. Dekle's or Mr. Daugherty's or Chief Philpot or the rest of their presence?

A I could have. I don't recall. You know, go to the restroom or get a drink of water.

Q You didn't go back to work?

A I didn't go back to work.

Q Approximately how long after you had agreed to undergo hypnosis did Mrs. Keene arrive?

A Thirty minutes to an hour. Probably thirty, forty-five minutes would be--

Q Excuse me. And all of you were sitting around, chatting, waiting for her arrival?

A Off and on. There were people coming and going and people making phone calls. There was discussion. I don't recall exactly who I talked to or really what it was about. It was people coming in and out. I didn't sit down and talk to one person for any great length of time is the best I recall.

Q Did you discuss hypnosis anymore during the period

of time?

A I don't recall. Possibly.

Q Did you discuss anything more about what you had seen prior to Mrs. Keene's arrival?

A Not that I recall.

Q Did you sense a feeling of excitement in Mr. Dellie or Mr. Daugherty or anybody else, any pleasure over what you had imparted to them?

A Yes, sir, they seemed pleased.

Q Okay. Did you get the impression that what you had come forward with was good as far as they were concerned?

A Yes.

Q And that it was something that was a positive offering in the investigation of the disappearance and ultimate recovery of the little girl?

A Yes.

Q Okay. All right. Enter Mrs. Keene. What happened then?

A I briefly went over the same story that I had told everybody I had met so far that day.

Q Okay. Now, you told her the story that you had previously told Mr. Daugherty and Chief Philpot. Was this before she placed you under hypnosis?

A Yes, sir.

Q Okay. And was that also in the presence of Mr.

Dekle, Chief Philpot, Investigator--

A I don't recall Chief Philpot being there.

Q I don't want to suggest to you any answers. Who was there, to the best of your recollection?

A I can't recall everybody that was there. There were people coming in and out of the room we were in.

Q Would you mind telling me where you were?

A In the dispatching office. I think the room is a file room now. It was a kind of a combination locker room-coffee room for the patrolmen.

Q Okay. That is at the Lake City Police Department?

A The Lake City Police Department.

Q How close is that to Investigator Daugherty's office?

A It's right across the hallway.

Q Okay. And how close is that to your office?

A I didn't have an office.

Q Well, where you worked at the Lake City Fire Department.

A Fifty or sixty feet.

Q Okay. Is it in the same building?

A It's in the same building.

Q Okay. Can you go from where you work to Investigator Daugherty's office without ever going outside?

A Yes, sir.

Q If you let out a real good shout, could he hear you from where you were?

A Yeah.

Q Okay. All right. I didn't mean to get off the track. Okay. You told your story to Mrs. Keene, and Mr. Dekle was present and Investigator Daugherty was present. All right. What happened then?

A She, we talked briefly about hypnosis. I don't recall exactly what was said.

Q Would it be safe to say that she told you that you would have no ill effects from hypnosis, that it would help you remember?

A Right.

Q That it would be a very relaxing experience, things of that nature?

A (Nods head affirmatively)

Q Did she go into the mechanics of it, what it does to your conscious or subconscious?

A No.

Q Did she tell you that you would be aware of what was going on around you as it was going on?

A Yes, sir.

Q Okay. Okay. Anything else that you can think she told you? Generally, what she said, she told you about the procedure to put you at ease and told you it was going

to be good for you and that it would help you remember? She can't take a nod down.

A Oh, yes.

Q Okay. Thank you. Okay. Then what happened?

A She started talking very slow and very monotonous.

Q Okay. Again, did she put on a tape recorder?

A Yes, sir.

Q Okay. Explain to me, if you will, before you start telling me what she said to you, the physical layout of the room as far as where you were sitting, she was sitting, and where other people may have been sitting and where the tape recorder was.

A Okay. As you enter the door, there was a table almost right at the door. There were several chairs at the table. I was sitting at the center. If this was the table, I would be sitting at the very end of it.

Q Okay.

A But Mrs. Keene was sitting at the very corner of the table. The tape recorder was in between the two of us and the microphone was sitting, you know, something like this.

Q Okay. Was Mr. Dekle present?

A (Nods head affirmatively)

Q Was Investigator Daugherty present?

A Yes, sir.

Q Was anybody else present?

A Yes. Several people came in and went out. They were in uniform.

Q People were walking in and out of the room during the hypnotic session?

A I remember hearing the door open and close. I remember hearing feet shuffling.

Q Okay. Would you mind just drawing me a diagram of what the room looked like and where everybody was seated, please?

(Whereupon, the witness drew the diagram at 11:33 o'clock A.M., after which the following proceedings occurred:)

THE WITNESS: Would you like the lockers?

MR. AFRICANO: No, I just want the positions of where people were sitting.

Would you just sign that, please?

(Whereupon, the witness signed the diagram, after which the following proceedings occurred:)

MR. AFRICANO: And put today's date on it.

(Whereupon, the witness dated the diagram, after which the following proceedings occurred:)

MR. AFRICANO: Thank you.

THE WITNESS: Um-hum.

MR. AFRICANO: Could I have this marked as Defense Exhibit 1 for identification?

THE COURT: It may be so marked.

MR. AFRICANO: Just for identification.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q So, according to your diagram, Mr. Dekle and Mr. Daugherty were sitting on opposite sides of the table?

A Yes, sir.

Q And you and Mrs. Keene were sitting at the corner of the table?

A Right.

Q More or less in between them.

A Um-hum.

Q Is that correct?

A (Nods head affirmatively)

Q And the tape recorder was sitting between you and Mrs. Keene?

A Right.

Q Okay. All right. The tape recorder was turned on and she proceeded to talk to you. Now, please tell me what she said to you, the best you can recall.

Let me ask you, before you go any further, these hypnotic sessions have been transcribed and there are tapes of them. Have you had an opportunity to review them before you came down here to testify today?

A A very brief chance to review them. I reviewed for

just a short while.

Q When was that, sir?

A Last night.

Q Okay. All right. Tell me, as best you can recall, after having read those transcripts, what Mrs. Keene said to you.

A She started off by telling me I was getting very sleepy and my eyelids were getting very heavy, and this went on for it seemed like a fairly long length of time. And she asked me to go back to the date that I remembered seeing a man and a girl, and I did.

Q Before we get into the specifics of what you related to her, I would appreciate your just telling me what your feelings were during that time. Did you feel that you were hypnotized?

A No, sir, I didn't.

Q Okay. Were you cognizant of the presence of the other people, cognizant of the presence of Mr. Dekle and the investigator, Daugherty, in the room?

A I don't recall, you know, remembering them being there, but I remember people coming in the door and going out of the door. I remember hearing footsteps. I was very tense and very nervous. I remember my neck bothering me a great deal, and I was sitting in a very straight-backed chair and my neck was very stiff. Probably it was from tension and

anxiety.

Q Do you have a recollection of feeling of that discomfort during the hypnotic session?

A Yes, sir, I do.

Q Okay. Was that affecting your ability to concentrate?

A I'm sure it was.

Q Okay. And you said you also were aware of people coming in or hearing the door open and close?

A Right.

Q Okay. Which would lead you to believe that people were coming in and out of the room?

A Um-hum.

Q Okay. After the hypnotic session was over, do you recall what Mrs. Keene said to you?

A She asked me how I felt. I told her my neck was bothering me. I can't recall exactly what she said. I don't recall if she told me or I overheard her tell someone else, but she was not absolutely sure that I was hypnotized. It seemed like she, there was some more discussion about being hypnotized, but I cannot recall exactly what it was at this time.

Q Did she indicate to you that she knew that or felt that you were, that you were uncomfortable during the session?

A Yes.

Q Indicated the discomfort?

A She mentioned that my neck seemed to be bothering me.

Q Okay. Do you recall, prior to her putting you under hypnosis or during the induction where she is telling you to count backwards in time, did she ask you to do anything like, I'm sure you're aware of the term "challenges", now, make you hold your arms out stiff and tell you you can't lift it or any of those things?

A I don't recall doing that.

Q Okay. At the conclusion of the, at the conclusion of the session, did she indicate to you that you might possibly or would be a better subject at a later hypnotic session?

A Yes. I don't recall exactly. It might not have been Mrs. Keene that told me, but sometime during the conversation it was brought forward that the more you are hypnotized, the easier it is to put somebody under hypnosis.

Q Was this--

A The more susceptible.

Q I'm sorry. I didn't mean to interrupt you again. Someone indicated to you at the conclusion of the hypnotic session that the more people are hypnotized--

A I think there was some discussion about, you know, would I mind doing it again.

Q All right. Who initiated that discussion?

A I'm not sure, but I think it was Mr. Dekle.

Q Okay. And what did you discuss with him about that?

A That where we were at, the amount of people present, the disturbances, was not very conducive to, you know, hypnosis. There were too many distractions. I was very, very nervous, have a lot of anxiety and a lot of tension.

Q Did you get, I'm sorry.

A That maybe we should try it again in a different area where it was quieter and no distractions.

Q Okay. And you think that was Mr. Dekle's suggestion?

A Yes, sir.

Q Did you get the impression or the feeling that Mr. Dekle or Daugherty weren't quite satisfied with the completeness of your recall?

A I don't know about them, but I wasn't.

Q Okay. You felt that, given better circumstances, better environmental conditions during the hypnotic session, perhaps you could be more exact or more vivid in your recall?

A Yes, sir.

Q Okay. And is this why you agreed to submit to it, then, again?

A Yes, sir.

Q You didn't have any bad feelings or aftereffects or any problems afterwards, did you?

A Not at all.

Q Okay. Jumping now to, I don't want to jump anyplace, really. How was the agreement or how was the arrangements made for the second hypnotic session?

A I don't know how the arrangements were made. Mr. Dekle asked me if I would mind undergoing another session of hypnosis. I told him I would not mind at all. He said he will get in touch with me in a day or so. I believe that's what he said, a few days.

Q Well, you indicated to me that it was more or less your dissatisfaction, that the first hypnotic session was not as good as it might have been, but did you suggest to Mr. Dekle that perhaps you could be hypnotized again or did he suggest to you that, Perhaps we can get more by hypnotizing you again?

A I believe it was Mr. Dekle that suggested that maybe we should try it again.

Q Okay. And did you infer from that that he felt that you would get more and you felt that you could give more?

A Yes.

Q Okay. All right. So you left it that day that the arrangements would be made for another hypnotic session?

A Right.

Q Okay. Did you know who would hypnotize you?

A No.

Q Did you ask?

A No.

Q Did you think it might be Mrs. Keene again?

A I don't recall. Probably assuming that it would be Mrs. Keene, I guess.

Q Okay. All right. How were you summoned or called or told to keep the appointment for the second hypnotic session?

A If I'm not mistaken, I was on duty at the fire station and Larry Daugherty, I believe, came over, and I'm pretty sure he talked to my chief first and asked if I was ready to have another session of hypnosis. That would be fairly accurate, as best I remember.

Q This would be three days later on the 31st?

A Right.

Q Okay. Do you recall whether it was morning or afternoon?

A Probably mid-morning.

Q Okay. Were you working?

A No.

Q Did you go with him at that time?

A Yes, sir.

Q You had no problem leaving your duties at the station to go. And where did you go?

A We went to the city commission room, which is upstairs in city hall.

Q Okay. And did Mr. Daugherty accompany you there?

A Yes, sir.

Q Okay. Was there anyone present at the city commission room when you arrived?

A I don't recall anybody being there. I think, shortly after we got there, Mrs. Keene, Mr. Burnette, and Mr. Dekle arrived.

Q Okay. Was anybody else there?

A I think there was a stenographer, somebody to take notes. I don't recall her name.

THE COURT: Would you speak up a little louder so that they can hear you?

THE WITNESS: I think there was a person there taking notes.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay. Can you describe the city hall, the city commissioners' room at city hall in comparison to this room?

A It's approximately the same square feet. There is a very large desk at one end with very high-back comfortable chairs behind the desk and there is seats in front of the desk with two aisles going through the seats.

Q Okay. Was there, did you and Daugherty have any conversations as you walked from the fire department to the city commission hall about the forthcoming hypnotic session?

A Yes. I believe it was at that time that I told him that I remembered the date that I seen it.

Q Okay. What did you tell him and what did he say to you?

A I told him, you know, I went home and was thinking about it and I had asked him if it was okay if I had any discussion with my wife. And he said yes, you can talk it over with your wife, but, you know, nobody else. So I told him about the discussion that I had with my wife, that I was very concerned about not being able to remember the date that I seen it. At this time, I was still not aware of what day the Leach girl went missing. And sometime during the conversation with my wife, she said it had to happen sometime around our little girl's birthday, and it jogged my memory and I began to remember that, yes, it was the morning after my little girl's birthday, but, you know, I was coming home to take a shower and change clothes.

Q Okay. Have I ever questioned you before--

A Yes, sir.

Q --under oath?

A Yes, sir.

Q Approximately about three times?

A Yes, sir.

Q Have you told me that story before?

A I don't think I have.

Q Okay. Well, we'll get back to that. When you got to the city hall with Daugherty and had this conversation with him, you went into the city hall, into the city commissioners' meeting room?

A Yes, sir.

Q Okay. Just you and he were there, awaiting the arrival of Mr. Dekle and Mrs. Keene and Mr. Burnette?

A Yes, sir.

Q And they brought a stenographer with them?

A I believe that's correct.

Q Was there anybody else present?

A No, sir.

Q Okay. Did you immediately sit down and go into the hypnotic session? Was there an exchange of conversation?

A There was a brief exchange of conversation, mainly just to help me relax to talk about this, this is a better room, it's quieter, you know, but it was a better atmosphere.

Q Before you started that, did Daugherty or yourself tell Mr. Dekle that you now recalled the date you saw this event?

A Yes, sir.

Q All right. Did they seem excited? Did they show

any pleasure over that you were able to make that recall?

A Yes, sir.

Q Okay. Do you recall what they may have said in response to your imparting that information?

A It seemed like Larry Daugherty said, you know, Sounds good, or something similar.

Q In other words, he indicated to you that it was great and wonderful?

A You know.

Q He expressed pleasure over the fact that you were able to recall it?

A Yes.

Q And do you think this was a good thing in the course of their investigation that you had come forward with it or were able to make this recall?

A I wasn't that concerned about, you know, their investigation, and I felt good that I remembered it.

Q Why were you not concerned with their investigation? Wasn't that what you were there for, to help in their investigation?

A I was there to tell something that I saw.

Q Okay. But what you saw was to help Mr. Dekle and Mr. Daugherty in their investigation, was it not?

A Yes, sir.

Q Okay. All right. So they have tried to put

at ease, relaxed, discussed the better environmental circumstances as opposed to the one you had three days before.

A Yes.

Q And proceeded to place you under hypnosis?

A Yes, sir.

Q And did Mr. Burnette chat with you at all about the phenomenon of hypnosis?

A Yes, sir, briefly.

Q Was it any different than what Mrs. Keene had explained to you?

A Well, it was very similar.

Q Okay. You didn't have any reaction, Well, I heard something different three days ago as opposed to now he is telling me something else?

A No.

Q Did you relate the story that you had previously related to Mr. Dekle and Mrs. Keene to Mr. Burnette in the same fashion you had done with Mrs. Keene before she attempted to hypnotize you?

A Yes, sir.

Q Okay. So you went over the story first. Okay. All right. Was everybody present in the room as Mr. Burnette attempted to hypnotize you?

A Yes, sir.

Q Okay. I ask you to draw one more diagram, if you

wouldn't mind. Would you please draw for me, if you can recall, how everybody was seated in the room?

A No, sir. I recall where I was sitting. Mr. Burnette was standing part of the time and sitting, facing me, part of the time, but, as to where everyone else was sitting, I don't recall. I know they were sitting at the desk, but, as to which one was sitting where, I do not recall.

Q Do you have a recollection of people being in certain positions without actually knowing who they were?

A Yes.

Q All right. Would you draw a diagram for me of those people who you don't know who they are and just put "person".

(Whereupon, the witness drew the diagram, after which the following proceedings occurred:)

(Whereupon, Mr. Africano conferred with Mr. Thompson, after which the following proceedings occurred:)

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay. Thank you. Okay. This represents a somewhat concave table.

MR. BLAIR: Your Honor, could we ask that that be marked.

MR. AFRICANO: Oh, I'm sorry. I apologize.

MR. BLAIR: Also, if we might be permitted to see it. Go ahead and mark it. I just would like to see it.

A110

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q This represents a concave type of desk in which Mr. Anderson and Mr. Burnette are on one side and, oh, I'm sorry. You don't know. And these are several other people.

A They're just--

Q Okay.

A --people.

Q Everybody else is on the opposite side of this table?

A Right.

Q Approximately how wide is that table, if you have any recollection?

A Three feet, three and a half feet, something like that.

Q And there was a court reporter or a stenographer there?

A Yes, sir.

Q And where was the tape recorder?

A Sitting on the table right next to me.

Q Okay. And were you facing Mr. Burnette?

A Right.

Q Were you seated in those high-back comfortable chairs? You said before he was in one and you were in the other.

A111

A Yes, sir.

Q Okay. Tell me what you were thinking about when he started to induce the hypnosis?

A I'm thinking, I hope this works.

Q Okay. Did you anticipate that it would?

A No, I had some doubt.

Q Okay. Were you hoping that it would help you recall?

A Yes, sir.

Q Okay. So what did Mr. Burnette do?

A He started talking in a very monotonous low voice that they use to put people under hypnosis. Then he put me through several challenges. One of them, I remember him having me stand up, telling me that one hand, had me extend my hands before me and level like so, and I had them turned over like so. Anyway, one hand had a very heavy object on it. The other hand had a balloon tied to it. And one hand was getting heavier and the balloon was pulling the other one up. And I had my--

Q Well, you say one hand had this and one hand had the other. He was telling you that one hand had this and the one hand had the other. You didn't actually have a balloon and the other object?

A No. And he just kept telling me how heavy one arm was getting and how much force was coming up with the other

one, and I was very surprised when I opened my eyes. And while my eyes were closed, I felt as though my arms were level. Well, they were initially. And I opened my eyes. One arm was here and the other arm was here.

Q Were you startled when you saw that?

A Not really startled. I was a little bit surprised.

Q Did you have a conscious reaction, My goodness, it's working, or, I don't believe this is happening?

A Not yet. He talked to me some more. Then he told me my arm was getting very stiff, on the count of three or five or something like this. I don't recall. And he counted one, two, three, four, five, whatever, and my arm got stiff. And I remember thinking to myself, the darn thing is working. I mean, that's the thought I had.

Q Did it give you any sensation of pleasure or anticipation or excitement?

A Surprise more than anything else.

Q It didn't surprise you enough to wake you up?

A No.

Q Okay.

A Then he asked me to tell him what I saw and I did so.

Q Okay. Did he do anything as far as take you back in time to another event as opposed to--

A Yes.

Q --the incident you were going to, would you describe that for us, please?

A He asked me to go back in, to a time of my life that I enjoyed.

Q Okay. Let me interrupt you just, did you tell him before the hypnosis about this event?

A No.

Q Because he wanted you to just go back to the time in your life?

A Yeah. He just left it up to me to go back to whenever I wanted to.

Q Okay. Fine.

A I have no reason why my mind picked this particular time, but it was a time that I throughly enjoyed.

Q Your wife hasn't yelled at you for not picking your wedding day, has she?

A No. And I went back to a period when I was fifteen or sixteen years old. I was hunting with my father and my younger brother and it was just we had a lot of fun that day.

Q Okay. Did you feel that you were actually there?

A Yes. Everything seemed very real.

Q Did it seem real in the sense that you were there or did it seem real in the sense that you were watching it on a TV screen or a movie screen?

A It more or less seemed like I was watching it. It

didn't seem like I was actually, you know, there.

Q Do you recall watching yourself?

A I don't recall seeing myself. I may have. I remember seeing my father and my brother, our hunting dogs. I remember hearing the sounds of the dogs barking.

Q How about your father speaking?

A Yes.

Q Your brother speaking?

A Yes.

Q The sound of the woods?

A I don't recall any sound of the woods.

Q Okay.

A Probably so.

Q All right.

A But I definitely remember hearing the dogs bark.

Q Okay. While you were reliving that and, as you say, you think you were seeing it, did you feel any emotion within, inside yourself while this was going on, like, my God, it's really working, or, I can't believe this is happening, or--

A I don't recall thinking that or feeling that. I very well may have.

Q Did Mr. Burnette indicate to you that you would be aware at a conscious level of your surroundings while this was going on?

A Yes, sir.

Q Were you aware at a conscious level of the surroundings, of him talking to you?

A Yes, sir.

Q And you telling him what you were saying?

A I was aware of them, him talking to me, yeah.

Q But you don't have a recollection of any emotional reaction, any tingling in your skin or your heart started beating fast because you were actually seeing this event?

A I remember feeling very, very good. It was just the day in my life that I really enjoyed.

Q Okay.

A And remembering it that well, you know, it was a pleasurable experience.

Q Did you have any feelings about Mr. Burnette because he had enabled you to have this pleasure?

A No.

Q Did it make you look upon him, you know, on a conscious level as someone who had given you pleasure or gratification?

A No.

Q And allowed you to enjoy or relive this moment in your life.

A No.

Q Did he give you any other challenges or put you through any other type of age regression techniques before he

got into the story which you were going to relate?

A No, sir.

Q At the end of the hypnotic session, the Burnette session, tell me what your feelings were.

A I felt better about it. There are still some things bothering me. I couldn't definitely identify the man. I couldn't remember exactly what the man was wearing. There were still some questions that I had that I would like to have been able to answer. I felt, definitely I felt better about, I was more at ease. I was more relaxed.

Q Did you feel that you had been hypnotized?

A Yes, sir, without a doubt.

Q What were your feelings about Mr. Burnette?

A He just acted very professional. He just acted like he knew what he was doing and I had respect for him for, you know, doing his job, but, you know, as far as being close friends, bosom buddies or anything like that, no.

Q All right. Did you go over again, after you were brought out of the hypnotic trance, did you go over again what you recalled?

A Yeah.

Q Okay.

A I don't think we went into it to any greater detail, but, yes, we did have a discussion as to what was better, how I felt about it, if I felt more relaxed, more at ease, this

was, but I don't recall any specific details. I just remember we had some discussions about it.

Q Okay. Did Mr. Dekle or Investigator Daucherty, were they part of those discussions?

A Yes, sir.

Q Did you sense any satisfaction or pleasure from Mr. Dekle or Investigator Daucherty over what you had been able to recall under hypnosis?

A They seemed pleased.

Q Did they state that to you?

A No.

Q I'm not saying that they patted you on the back or congratulated you, but did they say that you had said more under this hypnotic session than you had previously said under the previous one?

A I don't honestly know.

Q Do you recall what, if anything, you did say under hypnosis?

A Not word for word, no.

Q Okay. Do you recall Mr. Burnette telling you before you were brought out of the trance that you would remember everything that you said?

A Yes, sir, it seemed like he did say that.

Q Do you feel, at this point in time, that you have remembered everything that he said, everything you said?

Excuse me.

A Let me clarify this. You mean, can I go back and just repeat everything that I said that day?

Q No.

A No, I can't.

Q But you do recall him telling you that everything that you had recalled under hypnosis during that session you would recall at a later time?

A It seemed like he may have said something similar to that.

Q Okay. I'm saying, if I asked you verbatim, give me word for word what your conversation was, that's not what I'm saying.

A Okay.

Q I'm saying that any things that you had remembered during that hypnotic session you would rerember forever and ever. Is this what he told you?

A No, not exactly. At least that's not the way I remember it, you know, him saying that you will remember forever and ever everything you said today. It seemed like I remember him telling me that.

Q Do you recall, as he was bringing you out of the trance, him asking you or telling you, Now, in a few minutes, I'm going to awaken you, but, when I awaken you now, Andy, you will have complete recall and memory for everything we

did here today, you will have complete memory for your hypnotic session, you will remember all the details that you just discussed with me under hypnosis?

MR. BLAIR: Your Honor, I am going to object on the grounds that that's improper cross-examination. I think it's not cross-examination. Counsel is testifying based upon something that he is reading that is not in evidence. Now, he obviously can impeach him by prior inconsistent statements, but he is attempting to read a transcript, get it into evidence, by asking this witness of he can identify various portions of the transcript.

THE COURT: The objection is sustained.

MR. AFRICANO: May I argue for a moment, Judge? I asked Mr. Anderson what his recollections were of his conversations with Mr. Burnette. I asked him if Mr. Burnette told him that he would have complete recall of what he testified to. He said he didn't know whether he was told that. I read to him a sentence and asked him if that was what was said. Mr. Blair has characterized where I am reading it from. Mr. Anderson has just to answer it, No, I don't remember it, or, Yes, I do. I am not seeking to introduce portions of anything into evidence. I am just asking him if it was told to him by Mr. Burnette. I could have

quoted it from memory. I didn't have to read it.

MR. BLAIR: Unless Mr. Anderson has made a prior inconsistent statement, he is not permitted to do that. He has no basis for reading that and asking Mr. Anderson if he recalls it.

THE COURT: Just a minute, gentlemen. The question was, did Mr. Burnette tell you you remember this forever and ever? And he said no. Now--

MR. AFRICANO: And then I asked him, did he recall this being said to him. It's not his inconsistent statement. It's not a statement that he has made in the past. I'm asking him if someone had told him that.

THE COURT: I sustain the objection to the use of the document in the way that you are using it at this time.

MR. AFRICANO: All right, Your Honor.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q When, how long did you stay there after the hypnotic session?

A Not very long.

Q And did you discuss any more with Mr. Dekle and Mr. Daugherty the facts of the case?

A I don't recall any discussion involving the facts. We very well may have chatted briefly about it.

Q Was there any discussion of another hypnotic session?

A Yes, there was.

Q Okay. Who suggested that?

A Mr. Dekle, I believe.

Q Okay. And what was said to you and what did you say to him?

A I don't recall exactly what was said. He said, We may want you to be hypnotized again, would you mind? And I told him I didn't mind at all.

Q Okay. Did you have good feelings about hypnosis after that session?

A Yes, I was more relaxed.

Q As time passed after that, well, let me ask you this. Were you ever hypnotized again?

A No, sir.

Q As time passed after that hypnotic session, do you feel that you have been able to recall things any better than you did either before or during those sessions?

A Some things are better. Just thinking about it more, if my memory has improved in some areas, and maybe I had better explain to you. Initially, I was really involved in this thing. Just about everything else, my wife and my family, you know, it was kind of pushed to one side. And then I did just the reverse, as soon as the hypnotic session and

everything was over with, and, for a brief period of time, I, my mind was mostly on what I said, trying to make myself remember. And I saw that, you know, it was interfering with my family life, or I felt like it was, and so I did just the reverse. I pushed everything away from, out of, I would not, if I felt myself thinking about it, anything involving this case, I would get my mind off of it.

Q Well, you said that this was after the hypnotic sessions. For several weeks after that?

A No, not several weeks. Maybe five or six days at the most.

Q Okay. Was it causing you a lot of anxiety and emotional distress?

A Not a great deal. I was just kind of moody.

Q Did you feel depressed?

A Not really depressed. Just wanting to remember more. Wanting to be more certain. Going over things in my mind. I was just preoccupied for about a week after the hypnotic sessions.

Q Did you have headaches?

A No.

Q Any trouble sleeping?

A When you work the kind of hours I was working at that time, if you got a chance to sleep, nothing was going to stop you.

Q Well, how many hours were you working?

A It's hard to say. It varied greatly. It wasn't unusual some weeks to work eighty or eighty-five hours a week, with the fire department, putting in overtime with the fire department, working a part-time job.

Q Well, when did you have time to think about all of this?

A Well, that was just it. I was thinking about it while I was trying to work.

Q Okay. Was it affecting your duties?

A Not a great deal.

MR. BLAIR: Your Honor, I fail to see the relevance of this and I object on those grounds. You know, one or two questions are all right, but this has gone on and on on something that is of marginal relevance.

MR. AFRICANO: I will just ask one further question.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Did it ever cause you to have to see a physician during this period of time?

A No, sir.

MR. AFRICANO: Okay. Your Honor, I think we have gone beyond twelve, as I'm sure you realize. I'm going to be with Mr. Anderson for quite some time, so can we break for lunch?

THE COURT: Well, we'll take a recess now. Court will recess until one-forty-five.

MR. AFRICANO: Your Honor, could Mr. Anderson be sequestered between now and when we get back. I'm in the middle of my cross-examination.

THE COURT: I will see counsel in chambers about that.

(Whereupon, the trial was recessed at 12:14 o'clock P.M. for lunch and Court reconvened in chambers, after which the following proceedings occurred:)

THE COURT: What is your request now?

MR. AFRICANO: My request is, Judge, since I am in the middle of my cross-examination, of course, if we continue on, but, for the lunch break, I would have the opportunity to cross-examine Mr. Anderson, you know, without any intermittent chatting with the state attorney during that cross-examination. I would ask that the Court instruct the state attorney either not to discuss his testimony regarding what he has testified to or any future testimony that he may testify further on cross-examination and that Mr. Anderson be instructed not to discuss anything with the state attorney's office.

MR. DEKLE: I don't think that such an instruction is necessary. We don't intend to talk to Mr. Anderson

about his testimony while he is off the witness stand.

MR. AFRICANO: Okay.

THE COURT: The Court relies on that representation by the State.

MR. AFRICANO: Thank you, Your Honor.

(Whereupon, the foregoing proceedings in chambers were concluded at 12:16 o'clock P.M. and Court reconvened after the luncheon recess at 1:52 o'clock P.M. in Courtroom E, Fourth Floor, in the presence of the jury, after which the following proceedings occurred:)

AFTERNOON SESSION

THE COURT: Bring in Mr. Anderson.

Mr. Africano, you may proceed.

MR. AFRICANO: Thank you, Your Honor.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Mr. Anderson, did I understand you correctly when you testified earlier today, when Mr. Blair was questioning you, that you do not feel that there has been any appreciable difference in your memory from the time you first reported this incident to Chief Philpot and after you were hypnotized?

A No, sir, I don't feel like there has been a great deal of difference.

Q Okay. Do you recall making the statement to me in one of your previous times you have testified that you were

made to remember?

A It seems like I do recall it.

Q Would you please tell me what you meant by being made to remember?

A Going over stuff in my mind. I didn't mean to give the impression that somebody just made me remember. I more or less refer to the fact that I made myself remember, reviewing and trying to remember. The more you think about something, usually, the more you can remember.

Q Now, was the memory you were talking about when I was questioning you on August 27th, 1979 the memory you were talking about at that date or subsequent to the, just immediately subsequent to the hypnotic sessions?

MR. BLAIR: Your Honor, I'm going to object on the grounds that this is not proper cross-examination. If he is going to impeach him with a prior inconsistent statement, he has to confront him with it and ask him if he made that statement and then read him the precise statement.

MR. AFRICANO: Okay.

MR. BLAIR: He is asking him to define terms that he used in a prior out-of-court statement and I don't think that's proper cross-examination.

THE COURT: The objection is sustained.

MR. AFRICANO: I will be more than happy to comply

with Mr. Blair's request, Your Honor.

THE COURT: All right. Do it according to the rules. Lay a predicate.

MR. AFRICANO: No problem.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Do you recall my taking your deposition on August 27th, 1979?

A Yes, sir.

Q Okay. And that was at the office of the state attorney in Lake City?

A Yes, sir.

Q Okay. And Mr. Dekle was present? I was present? The court reporter was present?

A Yes, sir.

Q Okay.

THE COURT: Mr. Anderson, I will ask you to speak up because the ladies over there, I know it's easy to lapse into a low voice, but speak up so that they can hear you.

THE WITNESS: Okay.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay. You made the statement to me or the response to me, "I had," and excuse me. Your answer was, "I had, I

really don't know whether, but all during the time the investigation was going on, I had just a nagging feeling, you know, that the girl I saw was that Leach girl, a lot of doubt, you know, but I had a nagging feeling that it possibly could have been her."

My question was, "But now you have very little doubt?"

Answer, "Yes."

Question, "What happened in between?"

Answer, "Just I have thought on it more, being made to remember, talking about it, thinking about it, thinking an awful lot about it."

Now, I am asking you, is the "being made to remember" that you were talking about at that time the hypnosis that you went under?

MR. BLAIR: Your Honor, this is precisely the reason for my objection. Counsel has stood here and read a fairly lengthy passage, including several exchanges of questions and answers, from an out-of-court statement, not because this witness has given a prior inconsistent statement, something he has made on the stand. What has he said here today that is inconsistent with whatever Mr. Africano is attempting to get at? He has to confront him with an inconsistent statement. He hasn't done it.

THE COURT: Mr. Africano, this is the rule. As you know, you must ask, have you made a statement inconsistent

to that, and then proceed from there.

MR. AFRICANO: Certainly.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Do you recall making that statement, Mr. Anderson?

A Yes, sir, I do.

Q Okay. And that's the same statement you recall making to me that I just asked about "being made to remember?"

A Yes, sir.

Q Okay. My question is, is the hypnosis what made you remember?

MR. BLAIR: Your Honor, I don't see the relevance of this. He is confronting him with an out-of-court statement and asking him to expand on an out-of-court statement. Now, this is cross-examination of his testimony on the stand here. I don't think it's proper for him to select various passages, he indicated there were at least two depositions and a hearing under oath when he testified. It's not proper for Mr. Africano to just go through those at his leisure, find something, and then confront him with that. He can only do that if there is a inconsistent statement.

THE COURT: I'll permit him to answer what, to explain their use of that term. He has answered that once to my recollection now and I think the question is

repetitious, but I'll let you answer it again.

MR. AFRICANO: Thank you, Your Honor.

THE WITNESS: All right. Mr. Africano, it was a combination of a lot of things. When I was talking about I was made to remember, the hypnosis did help me recall it, certain portions of it more clearly. Going over and over what I saw, what I said made me remember.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay.

A Being subjected to recalling it sometimes made me remember things.

Q Okay. But is it safe for me to say that the hypnotic sessions that you underwent, to some degree, had an effect on the testimony you have given here today?

A To some degree, yes, sir.

Q All right. Let's move on to something else. During the months of February, March, April, May, June and July, in Lake City, in Columbia County, Florida, you were employed as a lieutenant with the fire department. Is that correct?

A Yes, sir.

Q Does the, or how often are you at the fire department?

A That's a very hard question. I am there, or I was

there an awful lot. I believe, at that time, we were working a twenty-four, forty-eight-hour shift. That is, we were on twenty-four hours, then we were off forty-eight hours. We would change shifts numerous times, different variations of working hours, but I believe that's what we were working at that time. Put in a lot of overtime, a lot of call-back time.

Q Did you work consistently during that period of time? Did you take any vacation time, any off time?

A I don't recall taking any vacation time. We may have had a sick day or something like that.

Q And does the Lake City Fire Department subscribe to the Lake City Reporter?

A Yes, sir, it does.

Q How about the Florida Times-Union?

A No, sir.

Q Okay. Do you and Mrs. Anderson subscribe to any newspapers?

A The Lake City Reporter.

Q Okay. And do you own a TV set in your home?

A Yes, sir.

Q Is there a TV set in the Lake City Fire Department?

A Yes, sir.

Q Is it kept on most of the time?

A No, sir. It's allowed to be turned on after five in the afternoon.

Q Okay. And do you get to read the paper much while you are at the station?

A After five.

Q Okay. And do you read the paper usually every day?

A No, I don't.

Q How often during this period of time would you say you read the paper?

A I have no idea.

Q All right. Would it be some degree of regularity?

A Once or twice a week.

Q Okay.

A I honestly don't know.

Q Sure. Do you recall when you first heard that Kimberly Diane Leach was missing?

A No, sir, I don't. I don't recall the exact day or where I was. You know, I heard that there was a girl missing.

Q Okay.

A But I do not recall.

Q Do you recall how long after the date she was presumed to be missing that you first heard about it?

A No.

Q Do you recall how you first heard about it?

A No, sir, I don't. It was probably while I was on duty at the fire station.

Q Okay. Do you recall what was said to you about her

disappearance?

A No.

Q Okay. During the months that transpired after her disappearance and the time her body was recovered, was there a lot of activity going on in Lake City with reference to the search for her?

A I'm sure there was.

Q Were you aware of it?

A Yes, sir.

Q Okay. How were you made aware of that?

A TV, radio, newspapers.

Q Would it be safe to say that her picture was in the paper on several occasions?

A Yes, sir.

Q A number of occasions?

A (Nods head affirmatively)

Q Would it be safe to say that the Lake City Reporter almost constantly carried stories about the search for the little girl?

A Yes, sir.

Q Would it be safe to say that the Lake City Reporter reported incidents about the little girl, what she was wearing, some of the leads that the police were following?

A I don't recall reading it, but very possibly they did.

Q Okay. Do you recall ever having seen the little girl's picture on the news as a missing person?

A It seemed like, yes, sir, I probably did.

Q Okay. Did there come a time when you first, or when you heard that Mr. Bundy was arrested?

A Yes.

Q Okay. Do you recall when that was?

A No, I don't.

Q Do you recall whether it was before or after Kimberly Diane Leach's remains were recovered?

A I don't recall if it was after or before. I honestly don't.

Q Did you see or read anything about Mr. Bundy in the paper?

A Yes, sir, I'm sure I did.

Q And do you recall seeing his picture?

A Yes, sir.

Q Do you recall having read a particular Lake City Reporter describing Bundy as the prime suspect?

A No, I don't recall reading that.

Q Did you know, in your general knowledge of the events that were going on, that Mr. Bundy was the prime suspect?

A Yes.

Q Okay. But how long a period of time did you know

that?

A I honestly don't know.

Q Would it be safe to say that it was fairly shortly after his arrest and up until the time that you reported what you reported to Chief Philpot?

A Ask the question again, please.

Q Okay. Would it be safe to say that you had this knowledge that Mr. Bundy was suspected in the disappearance of Kimberly Diane Leach from shortly after he was arrested up until the time that you reported what you reported to Chief Philpot?

A Yes.

Q Okay. Is it safe to say that it was pretty much the topic of conversation amongst the men at the fire department, the police department?

A I wouldn't say that it was, you know, a great big thing. There was discussion about it, but it wouldn't, it wouldn't, it wasn't a real big deal.

Q You were in Lake City at that time, were you not?

A Yes.

Q And you don't think it was a very big deal?

A Not in our department.

Q Your department is right next door to the police department, is it not?

A Right.

Q Did you sense or know about any great amount of activity going on in the police department?

A Sure.

Q Do you know that there was a special room set up in, I guess, an old post office that was considered the task force --

MR. BLAIR (interposing): Objection, Your Honor. Counsel is testifying.

THE COURT: Sustained.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Were you aware of any special group organized to search for the little girl?

A I was aware that there was a large search party organized, but, as to any specific group, no.

Q Did you ever observe any horses going by that were part of any mounted posse?

A I honestly don't recall any horses.

Q Did you ever see any helicopters flying overhead?

A Yeah.

Q Okay. Was there an abundance of Florida Highway Patrol men in Lake City and Columbia County at or about that time?

A Yes, there was.

Q Were you aware that they were all part of the

search?

A Yes.

Q Okay. How many times do you think, to the best of your recollection, did you see Kimberly Diane Leach's picture in the newspaper or on television?

A Maybe two, three, four times.

Q Okay.

A I didn't dwell to any great extent on this, Mr. Africano. I spent a lot of time working. I had other things on my mind.

Q Okay. Well--

A I realize this was a great big, you know, think in Lake City, but, at this particular time in my life, I had other things on my mind than what was going on in Lake City.

Q Okay. Was there not also a missing persons bulletin posted in the fire department with her picture on it?

A No, sir, not in the fire department.

Q Where was it posted?

A I believe there was one in the police department.

Q Okay. Did you ever see that?

A Yes, sir.

Q Okay.

MR. AFRICANO: May I have State's Exhibit 1, please?

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Is this the picture that was on that missing persons photo?

A Yes, sir.

Q And was this the picture that appeared in the newspaper and on TV the number of times that you said you saw it?

A Yes, sir.

Q Okay. How about Mr. Bundy's picture? How many times did you see his picture in the newspaper or on TV?

A I can only recall seeing it one time. I may have seen it more, but I only recall seeing it one time that I specifically looked at it, you know.

Q Do you recall when that was or what picture it was?

A I don't recall the date. I recall the picture. It was taken by somebody standing above him. It was just like somebody had a camera and someone was standing there. and it was straight on, taken at a down angle.

Q Were you aware that Mr. Bundy's picture was in the paper or on TV on a number of occasions--

A Yes.

Q --during that period of time?

A Yes.

Q Besides what was characterized in that newspaper article or what was being speculated in the press, were you

aware of any of the opinions of other people that you may have come in contact with as to who the prime suspect was in this case?

A You're talking about the people I work with?

Q Yeah. Anybody. Was there any rumors, scuttlebutt, gossip, opinions expressed?

A The firehouse, there is always gossip and scuttlebutt. I don't recall anybody making a specific statement, you know, regarding their opinion of Mr. Bundy. I probably did hear something, one way or the other, but right now I don't recall it.

Q I think you told Mr. Blair that the girl that you now recall seeing at the school resembled your niece.

A Right.

Q Okay. And at the time that you observed what you say you observed, you even thought to yourself, Gosh, that looks like my niece?

A Right.

Q Okay. Because it looked like your niece, was your attention drawn to this particular thing that you were viewing with any heightened interest than it would if it wasn't someone you recognized?

A Yes.

Q And does this picture look quite a bit like your niece?

A Yes, it does.

Q Okay. Did you ever associate in your mind, when you saw that picture in the newspapers or saw it on the missing person poster, that that looked like your niece?

A Yes, I did.

Q At any time, did you say, Well, that looks like my niece and the girl I saw at the school looks like my niece and that must be the girl that I saw? Up until July 28th, 1978.

A Yes, I said it to myself several times. I didn't really want it to be. I stated before, I didn't want to be involved in this. I didn't want that to be the same girl.

Q Why didn't you?

A A good question.

Q You were a paramedic, are you not?

A Right.

Q You are a lieutenant.

A Right.

Q You are in a supervisory capacity.

A Right.

Q You have been trained to help and save other people's lives.

A Right.

Q You have been trained to rise to the occasion in time of emergency or danger.

A141

A Right.

Q And all of this period of time, between February 9th, 1979 and July 28th, excuse me, '78, and July 28th, 1978, it never dawned on you that what you saw was, what you testified to today was that which you saw?

A Yes, it did.

Q Then why did you not come forward before? Why did you wait five months and three weeks?

A Because I wasn't sure of what day I saw the girl. I wasn't sure at all. I didn't want to become involved in it. I saw one picture of Mr. Bundy. I looked at the picture. It did not closely resemble the man that I saw with the girl.

Q But the picture that you saw of the girl closely resembled the picture you knew of and the view that you had of your niece and they both look like the girl you saw.

A Mr. Africano, I could have seen that girl any number of times. I have no idea how many times I have went by that junior high school. It was just a vague idea that I saw a girl that resembled my niece. I was not sure of what day that I saw this girl.

Q Well, then, how are you so sure that it was February 9th, that that was the day that you saw this girl, if you had the association in your mind that the girl you saw looked like your niece and, during this period of time, you knew what

Kimberly Diane Leach looked like? How can you--

MR. BLAIR (interposing): Objection.

THE COURT: Let him finish the question, Mr. Blair.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q How can you be so sure that the day you saw Kimberly Diane Leach was February 9th, 1978?

MR. BLAIR: Your Honor, counsel is argumentative and he is testifying as opposed to asking questions. I am aware of the fact that he can lead him, but I think counsel has gone far beyond proper cross-examination.

THE COURT: I'll overrule the objection to that question. He may answer it.

THE WITNESS: Ask me the question again.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay. You said that you had some doubts about coming forward because you weren't sure it was Mr. Bundy. Is that correct?

A Right.

Q Okay. I ask you that, how is it that you weren't sure, I'm paraphrasing what I said. Maybe it will be more clear if I ask it another way. How was it that you were not sure that the girl you saw, the girl that you had this vague recollection of, wasn't Kimberly Diane Leach when you

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knew what her picture looked like, when you knew what your niece looked like, and you had associated the two at the time of the event?

A I was aware that Kimberly, the Leach girl resembled very much the girl that I had seen and the only reason that I can give for not coming forward sooner is, as I stated before, not wanting to be involved, having a lot of other things on my mind at the time, not knowing the exact date that I saw the girl, halfway afraid of creating turmoil, needlessly, seeing law enforcement on a wild goose chase. Basically that's it, Mr. Africano.

Q You mean to tell me that, as a lieutenant, a paramedic, a man trained to rise to the occasion in an emergency, would sit by for five months and three weeks and let this feeling gnaw him that he might have seen something, with all that was going around him, and not come forward with what you might have seen because you didn't want to send police on a wild goose chase?

MR. BLAIR: Objection. Argumentative.

THE COURT: I think you're arguing with him now, Mr. Africano.

MR. AFRICANO: Well, Your Honor, he testified as to the reasons why and I am asking him, in light of those things, is that still his answer?

THE COURT: You didn't ask him that, Mr. Africano.

The objection is sustained to that question as phrased. You're argumentative.

MR. AFRICANO: All right.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q All right. So your reasons ware you didn't want to get involved?

A Right.

Q You didn't want to send the police on a wild goose chase?

A Right.

Q What other reason did you give me? I'm sorry.

A Well, not exactly--

MR. BLAIR (interposing): Your Honor, that's repetitious. He has already detailed the reasons why he didn't want to get involved and I don't know why it's necessary for Mr. Africano to go over them again and again.

THE COURT: Sustained.

MR. AFRICANO: Okay.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Were you aware shortly before you came forward with this information that Mr. Bundy had or was to be indicted for the kidnapping and murder of Kimberly Diane Leach?

A Yes, sir, I was aware of that.

Q Okay. Could one of the reasons that you then came forward was that you were secure in the fact that the police had caught and charged the right man?

A No.

Q Had nothing to do with your determination to come forward?

A No.

Q You testified earlier this morning in response to Mr. Blair that, when you saw this picture on television, if I'm misquoting you, please correct me, that I saw a man that looked a lot like the man I seen at the school with the Leach girl.

A That's correct.

Q Is that what you said?

A Um-hum.

Q How did you know, when you had, when that picture jumped out at you, that you had seen that man with the Leach girl?

A Because I was aware that the girl I see was very, very possibly the Leach girl.

Q Well, you know, you made the statement that you had seen him with the Leach girl, but, up until that moment in time, you had not fully and completely connected in your mind the pictures you had seen in the paper of Kimberly Diane

Leach, the fact that she looked a lot like your niece, and that you had seen a girl that looked a lot like your niece in this situation before. Why didn't you at least come forward and say, I saw the Leach girl?

MR. BLAIR: Your Honor, it's argumentative. It's repetitious.

THE COURT: I sustain it. He answered that question two or three times.

MR. AFRICANO: Okay.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q How did you know, when that picture jumped out at you, that it war it was the Leach girl?

A Mr. Africano, I probably knew it for some time. Exactly when I realized that it was the Leach girl, I have no earthly idea. I just would not admit it to myself.

Q Okay. Would it be safe to say that you knew it, but would not admit it to yourself prior to seeing Mr. Bundy's picture on television?

A Yes, sir.

Q During the course of time while the search for the Leach girl was going on, did you ever have a conversation with anybody about what you thought you might have seen?

A Yes, sir. One afternoon, I don't recall a date, a friend of mine, myself, Mr. Frank Gorman, were fishing in a

lake. I don't recall how the conversation come up, but we were fishing, relaxing or something, and we done very little. And he made the statement that he had seen two young girls a day or so before around the lake where he had been fishing. It was the same lake we were fishing in. And you know, it looked like they had been living in the woods. Their clothes were dirty and one of them closely or vaguely resembled someone that could have been the Leach girl. And I said, I don't recall specifically what I said, but I stated that I may have seen the guy that picked the Leach girl up or I may have seen someone that could have picked up the girl.

Q And this was during the search for her?

A Yes, sir.

Q And you actually said, I think I could have seen the guy that picked up the Leach girl?

A I'm not sure I said Leach girl.

Q Are you, you were referring to, whether you are referring to as the Leach girl or not, you're referring to the girl that was missing?

A Right.

Q Okay. And you imparted that to your companion?

A Right.

Q Okay. Did he suggest to you, I think you just said he suggested to you that he thought he may have seen her or girls that, one of whom might have been her?

A Um-hum.

Q Do you know if he reported his sighting to the police?

A Yes, sir, I believe he did.

Q But, even though you thought about it enough to discuss it with him, you didn't think it, you didn't think enough about it to report it to the police?

A No, sir.

MR. BLAIR: Objection.

THE COURT: He has answered it now. Overruled.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Mr. Anderson, do you need to take a break?

A No.

MR. AFRICANO: I'm sorry. Excuse me a moment.

Mr. Thompson advises me that Juror Number Six, are you having a hard time paying attention, sir?

JUROR: No, sir.

MR. AFRICANO: Are you sure?

JUROR: No, sir.

MR. AFRICANO: Would you like to take a break?

JUROR: It stopped.

MR. AFRICANO: Okay.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay, Mr. Anderson. You testified earlier to Mr. Blair as to the time that you recall leaving the fire station on that day. Do you recall what you testified to?

A Yes, sir.

Q And what time did you testify to?

A Sometime between nine and nine-fifteen.

Q Do you recall ever having testified under oath as to different times?

A Yes, sir.

Q What were those times?

A Sometime around eight-fifteen to eight-thirty or thereabouts. But I also stated that it could have been later than that.

Q Did you read over your testimony on those previous occasions?

A Yes, sir.

Q Okay. Did you discuss that with Mr. Blair and Mr. Dekle?

A Very, very little.

Q When was that?

A Last night.

Q And you went over your testimony and you went over the differences in the times that you had testified to before and what you were going to testify to today?

A No, we didn't go over the differences. What we did

is they took me from the time, from eight o'clock, from the time that you come on duty and I went through my routine, the routine that all lieutenants and all paramedics go through.

Q Um-hum.

A Eight, eight-fifteen, coffee break. A discussion amongst the men about the equipment, the things that may or may not have to be done to it. After eight-fifteen, assign everybody a ward detail, assign the firemen, the fire positions, assign the EMTs, the EMT positions, and drivers and whatever. And then you check out your drug kits. There are three very large drug boxes. You have to account for all the items in them. You have to set out the fibrillators. You have to check out radios. And normally, by the time I go through all of this, it would take me approximately an hour.

Q Isn't it true that most of the men coming on at the eight o'clock shift arrive at the fire station around seven-forty-five?

A Some of them do. Some of them make it right at eight o'clock.

Q But most of them are there at eight o'clock. And you haven't previously testified, as you sat around, having coffee, and make those assignments between then and eight-fifteen?

A Sometimes, yes.

Q In the prior times that you have testified, that the

time you left the station was considerably earlier than the time you testified to today, did you ever go through that same thought process of how long it was going to take you to do all of those things?

A No, sir, I didn't, not that I can recall.

Q On your normal working day, when you would get off, at eight o'clock, and not have to work that shift, was it still your responsibility to make those assignments?

A No, sir.

Q Whose responsibility would it be?

A The oncoming paramedic.

Q Okay. Since that was your shift, you had to do all of those things before you left?

A Yes, sir.

Q Do you recall what times you have previously testified that you left?

A I think the first time I said sometime between nine and ten. Talking to you, I don't recall on which occasion I said it was probably around eight-fifteen to eight-fifteen, thirty.

Q Now, wasn't the first time, you said it was nine to ten, is when you reported that to Mr. Dekle?

A Right.

Q Okay. But, when you testified in deposition to me, it was during the time that you said you had thought about it,

mulled it over, thinking it often and hard about it, and being made to remember about what had happened. Is that correct?

A Yes, sir.

Q Okay. And then, when I asked you the question as to when you got off work and left the fire station, you testified to what?

MR. BLAIR: Your Honor, counsel is testifying.

MR. AFRICANO: Well, I don't think I'm testifying, Judge.

THE COURT: You are.

MR. AFRICANO: If he testified.

THE COURT: That's improper procedure.

MR. BLAIR: And he has indicated previously testified.

THE COURT: You made an inference to a statement and you can use the deposition, as you know the rules.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Do you recall my taking your deposition on September 6th, 1979, the second time I took your deposition?

A Yes, sir.

Q And I believe that was in Live Oak that time, at the office of the state attorney in Live Oak. Do you recall my stating to you, "So you assigned everybody to duties that

day?"

Your answer, "Yes."

Question, "And had coffee?"

Your answer was, "Yes."

"Is that the normal routine? It takes a half-hour?"

Answer, "No. Normally, it doesn't take but fifteen to twenty minutes at the most, ten to fifteen minutes at the most."

Question, "Well, what is the margin, plus or minus eight-thirty, that you could have left that day?"

Answer, "Fifteen minutes, I guess."

Question, "So it could have been eight-fifteen or eight-forty-five?"

Answer, "Yes, I think so. I doubt it was that late."

Question, "It could have been--"

Now, my question is, was that the truth when you answered at that time?

A Yes, sir.

Q Okay. But it's different to what you're testifying to today?

A Yes, sir.

Q And prior to your giving me that deposition, did you go over your testimony with Mr. Deklo or Mr. Blair?

A No, sir.

Q Did you go over your testimony with Mr. Dekle or Mr. Blair before you testified today?

A Yes, sir.

Q Thank you. Now, do you recall, when we were discussing hypnosis, you said that you recalled the date being February 9th, 1978 because, at some point in time, Daugherty or Dekle or somebody told you to go home and think about it?

A Um-hum.

Q You went home and talked to your wife, and she suggested that it might have been around the time of your little girl's birthday.

A Yes, sir.

Q And that's how you associated the date?

A Yes, sir.

Q And I asked you at that time, have you ever testified under oath to me differently? And you said yes. Or I asked you, had you ever told me that story before?

A Right.

Q Okay. Do you recall what other stories you have told me before?

MR. BLAIR: Your Honor, I'm going to object to that. If he wants to confront him with a specific statement, that's one thing.

THE COURT: Sustained.

MR. AFRICANO: Okay. If I might just have a moment, Your Honor.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q All right. Before we get to that, Mr. Anderson, between the hypnotic sessions, was there ever an occasion where you were called in to Chief, your chief's office, the fire chief's office, and Mr. Dekle and Mr. Daugherty and some other people were present, and they were going over your work record?

A Yes, sir.

Q Okay. Would you relate to me what that event was about?

A I think there was discussion as to whether I would work that day or not.

Q What day?

A February the 9th.

Q Was this before or after you went home and talked to your wife?

A I'm really sure it was after.

Q After you went home and talked to your wife?

A I'm not certain, but I think it may have been.

Q Okay. Tell me what was going on when you got in there and what were they discussing as far as February 9th?

A Whether I was on duty or not is the biggest thing I

can remember. I was under the impression at that time that I was off duty, that I was going home.

Q Okay. What were they going through your work records for?

A I don't know.

Q They were attempting to find out of you worked on February 9th?

A Right.

Q Did anybody say anything to you about your working on February 9th?

A I don't recall, Mr. Africano.

Q Did anybody tell you that you couldn't have seen what you saw because you were working on February 9th?

A They may have.

Q Do you recall having a reaction to that, some semblance or feeling of relief?

A I can't honestly recall being asked that.

Q Do you recall testifying before Judge Jopling at a pre-trial hearing on October 19th, 1979?

A Yes, sir.

Q Okay. It was in Judge Jopling's chambers in Lake City at the courthouse?

A (Nods head affirmatively)

Q I asked you--

MR. BLAIR: What page?

MR. AFRICANO: I'm sorry. Page 25.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q We were talking about the date in question, and your answer on page 25 was, "The day, February the 9th, how come I remember that was the day that I had seen the white van and the girl in that van?"

Question, "So you don't recall now how you came to recall that?"

Answer, "Yes, sir, but I'm trying to get it exactly, as close as I can. Right. I don't remember the exact circumstances or who was there. We were trying to figure it out, if February the 9th was the day that I had seen the man and the girl in the van. I'm trying to remember. I think maybe Mr. Dekle or Mr. Daugherty, I don't recall exactly who was there."

Question, "Was the fire chief there?"

Answer, "It was in his office, if I remember it."

"Was the assistant fire chief there?"

Answer, "Yeah, but he didn't stay too long. He left."

Question, "Was Frank Moore there?"

Answer, "Yes, in and out."

Question, "You said Mr. Dekle was there?"

Answer, "It seemed like he was. I'm not absolutely

sure."

I'm going on down.

"Haven't you testified that it was between the two hypnotic sessions?"

Answer, "I probably did testify to, it was very little between the two hypnotic sessions."

Question, "Correct me if I'm wrong. You said you recalled going into the fire chief's office and all of these people were sitting there, trying to find out if you worked on February 9th."

MR. BLAIR (interposing): I realize he hasn't finished with the question, but I think the harm may already be done. I move to strike that and move to have the jury instructed to disregard that. Counsel is not impeaching this witness. Counsel is testifying. He has not established a prior inconsistent statement and counsel has taken great liberties with reading from the transcript of a prior court statement here. That is not proper. It should be stricken. And I would ask the Court to strike it and ask the jury to disregard it.

THE COURT: The motion is granted. The jury will disregard the last question propounded by Mr. Africano.

Now, Mr. Africano, you know the rules. You ask him

a question and then if, you ask him had he ever given a statement inconsistent with that, and proceed from there.

MR. AFRICANO: I apologize if that was improper, Your Honor. I was getting up to where it's more specific and if I might continue.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q My question at page 27 was, "And you wondered why February 9th was such an important date, to find out if you worked?"

Answer, "I had a fair idea as to why it was so important."

Question, "What did you think?"

Answer, "If what I saw happened on February the 9th, that--

THE COURT: Mr. Africano, you are continuing to just do what's-- Ask him a question and then, if you think you can impeach his answer to it, ask him did he ever make an inconsistent statement to that and then use the deposition accordingly.

MR. AFRICANO: Well, Your Honor, he has made an inconsistent statement. He doesn't recall.

THE COURT: Wait a minute, now. Wait a minute, now. Let's proceed as I have directed.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Mr. Anderson, I'll ask you again, do you recall, sometime between the two hypnotic sessions, being called into the fire chief's office and Mr. Dekle, Mr. Daugherty and perhaps others were going over your work records to determine if you were working on February 9th?

A Yes.

Q Okay. And you are aware they were looking for the date February 9th?

A Right.

Q Okay. Did that have any significance to you?

A Yes.

Q And what significance did it have?

A If I was working February the 9th, there was a good chance that I was mistaken as to who I saw, what I saw.

Q Okay.

A In other words, if I was on duty, what I saw happened another day.

Q Okay. And was that the first time that that date became significant to you?

A I'm not absolutely certain. It seems like the first time that I went to see Mr. Dekle and Mr. Daugherty--

Q I'm sorry, Mr. Anderson. I can hardly hear you.

A It seemed like the first time that I went to Chief

Philpot, Investigator Daugherty, Mr. Dekle, I went home to talk it over with my wife, trying to establish when I could have seen it, and my wife said, Well, I don't remember the exact date, or something similar to that, but it happened sometime around Lori's birthday. And I remembered leaving the fire station in the morning, and I was assuming that I was off duty, going home. And so, a day or so later, maybe the following day, after talking with my wife, they were checking my records to see as to what day I worked and what day I was off.

Q Did you report to them during that session, while they were going through your records, that you had independently recollected that February 9th, 1979 was the date you had seen what you saw?

A No, sir, I didn't. I don't think I did.

Q Is there any particular reason why you did not?

A No, sir, not that I can think of. I'm not even dead certain that that is the exact day that I had this particular discussion with my wife. It could have been the following day, after talking and checking with my records. I honestly can't recall at this instant.

Q So, if the conversation that you had with Mrs. Anderson was subsequent to this meeting with your chief and Mr. Dekle and Investigator Daugherty looking over your records of the 9th, would it be safe to say that, during

that particular congregation, that was the first time that February 9th became significant to you?

A Yes, sir.

Q Okay. So, at that point in time would be the first time that you realized that the date you were supposed to have seen what you had reported seeing was on February 9th, 1978?

A (Nods head affirmatively)

Q Now, you have indicated on this chart that the fire station is somewhere down that way. If I might, would it be over here?

A Yes, sir.

Q Okay. Approximately how many blocks?

A Two blocks.

Q How long would it take you to get from the fire station, once having exited it, getting into your truck, to get to the position you have marked A on that exhibit, whatever the exhibit number is, the aerial photograph of the Lake City Junior High and the area surrounding it?

A Depending on the traffic, a couple of minutes, three minutes.

Q Okay. It wouldn't take any longer than that, would it?

A Probably not.

Q Okay. As you approached what you saw in front of

you, do you recall at what point in time you first noticed the traffic backing up in front of you?

A Probably as I was at First Street.

Q First Street would have been how far from the intersection that runs north and south and east of the school campus?

A It would have been two blocks.

Q Okay. That is Third Street, the street that runs north and south and just west?

A You're talking about where A is? No, that's Second Street, if I'm not mistaken.

Q This would be here?

A Yes, sir, I believe that is Second Street.

Q Okay. And so you were a block back here, a block back here when you first noticed it?

A Right.

Q Well, tell me, if you can recollect, what is the first thing you remember seeing?

A I remember seeing the traffic going around the middle.

Q Tell me what the weather was like.

A It was cloudy, overcast. I don't recall it raining at all.

Q Okay. Was it misty?

A Possibly. I don't think so, but it possibly could

have been.

Q Foggy?

A No, I don't recall any fog.

Q Did you have your windshield wipers on?

A No.

Q Is there any reason that you didn't have your windshield wipers on?

A Yeah.

Q What was the reason?

A If it was misting, it wasn't misting very heavy. My windshield wipers squeak and it's really irritating.

Q Do you recall turning them on intermittently at least to clean your windshield and just turning them off so you wouldn't have to hear the noise?

A I don't recall doing that. I very well could have, but I don't recall.

Q Okay. Were you stopped when you first noticed this white van?

A No, I don't recall. I don't believe I was.

Q Could you see it from a distance?

A Yes.

Q And there were two cars in between you?

A Yes, sir.

Q Okay. From the time that you came to a full stop to the time you proceeded on, how long was it?

A No 5

A Thirty or forty-five seconds, something like that.

Q Is that your best recollection right now of the time that you spent there?

A Yes, sir.

Q Do you recall my taking your deposition on August 27th of 1979 at the office of the state attorney in Lake City? It's at page 27.

A Um-hum.

Q Where I asked you the question, "Do you recall how long you were parked there or stopped there?"

Answer, "Probably forty-five to sixty seconds. Maybe. Maybe. I'll say anywhere from forty-five," and there is a typographical error. It says, "minutes to a minute and a half."

And then Mr. Dekle chimed in. "You mean forty-five seconds?"

And you answered, "Yes."

Do you recall testifying at that time?

A Yes, sir.

Q Was that the truth when you testified to it at that time?

A Yes.

Q And later on, at page 37, I asked you, "So, when you approached and had to stop, you were at a still position anywhere from forty-five to sixty seconds?"

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Answer, "Maybe a little bit longer."

Question, "A little bit longer?"

Answer, "Yes."

Is that the truth when you testified to it then?

A Mr. Africano, when you're sitting, waiting for the traffic to move, I don't look at my wristwatch and time it. When I answered your question each time, I'm telling you at that time what I feel like the time span may have been. I don't believe I spent more than a minute there at this time.

Q Okay.

A I feel like forty-five seconds is, you know, is probably as close as I could come of being close as to the exact time. It could have been more. It could have been a little bit less.

Q Okay. So you're really not sure?

A No. Like I said, you don't sit there and look at your second hand on your wristwatch.

Q Do you have the same degree of certainty about everything else that you have testified to today?

A No.

Q Okay. Describe for me the scene as it appeared in front of you, the two cars and the van. How much of the van could you see?

A All I could see was the back of the van.

Q How much of the back of the van?

A From midway on the back door and up.

Q Okay. Did you ever see any more of the back of that van?

A No.

Q At any time from the time you were sitting there for whatever length of time you were sitting there until such time as that van drove off and pulled out of sight after you turned one way and it went the other, did you ever see any more of the back of that van?

A No, sir, I didn't.

Q Then how could you, when Mr. Blair handed you this picture, in a split second, say that looks like the van you saw?

A Mr. Africano, you can take most any van you want to, paint it white, and it will resemble that van.

Q Okay. So what you are identifying here is not the white van that you saw, but a white van?

MR. BLAIR: Your Honor, counsel is arguing with the witness. The witness never said that was the white van. He said it was similar.

THE COURT: Ask him a question, Mr. Africano. Don't argue with him.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Are you saying that this is the white van that you saw?

A No, I'm not. I'm saying that it resembles the white van that I saw, Mr. Africano.

Q Okay. And you say you saw that much of it, the upper two-thirds?

A Thereabouts, yes.

Q Okay. Did the windows look about the same?

A Yes, sir.

Q Okay. Do you recall reporting to Mr. Dekle on January 28th of 1978 that the van had curtains on it?

MR. BLAIR: Your Honor, I am going to object. He is testifying.

MR. AFRICANO: I asked him if he ever reported something to Mr. Dekle, Your Honor, or told Mr. Dekle.

THE COURT: I'll overrule the objection.

THE WITNESS: I don't recall telling him that it had curtains.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Okay.

A I may have told him I didn't remember being able to see through the back glasses.

Q I'm sorry.

A I don't ever recall telling him that it had curtains.

I think I remember telling him it seemed like the windows were blocked. I couldn't see through the rear windows.

Q Okay. So that was at the time that Mr. Dekle took your statement?

A Um-hum.

Q Okay. But you testified today that you could see through the windows and see the man gesticulating at the little girl or to the passenger side?

A At the time that it was parked, I could not see through the rear windows, for whatever reason. I have no idea. It may have been fogged. It may have been the water. Or it may have been light reflection. I just don't recall looking through and being able to see through the rear windows.

Q But, later on down the street, you do recall looking through and seeing the people?

A Yes.

Q Or the shadows?

A For whatever reason, I could see through the rear windows then.

Q Okay. Do you recall seeing a license tag?

A Yes. I remember seeing portions of a license tag.

Q Is that your recollection now or is that your recollection of what you said before?

A It's my recollection now.

Q Okay. And do you recall what portion of the license

tag you saw?

A It seemed like just a very small portion of the top of it.

Q And do you recall the color?

A Yes, sir. I believe I stated at one time that I thought it may have been green and white.

Q Do you recall having stated that the reason you knew it was a Florida tag was because it was green or white, green and white?

Has anybody told you about the coloring of Florida tags?

A No, sir. I know there are several. There is orange and white, green and white.

Q So, if you reported that the tag that you recollected seeing was green or white, this could not have been the tag on the van you saw?

MR. DEKLE: Objection, Your Honor. That's argumentative. The photograph is not at this time in evidence and I object.

MR. AFRICANO: Well, Your Honor, he has had him identify a photo similar to the one he saw. I am asking if the tag on this photo is similar to the one he reported seeing. I am doing no more or less than Mr. Blair did.

MR. BLAIR: If he asked that question, we have

no objection.

THE COURT: You didn't ask that question.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Is the color of the license tag in this picture the same color as the license tag that you recall seeing on the van?

A No, sir, it's not.

Q Thank you. Do you recall anything else distinctive about the van?

A No, sir, I don't.

Q Now, in observing the people you say you observed, over this period of time, you described the girl that you saw. Do you recall seeing her wear a coat?

A No.

Q Do you recall, or tell me again what you said you can recall her carrying.

A She had an object. I'm not absolutely positive of what it was. It could have been a medium-sized purse. It could have been a rolled-up jacket. But I feel like it was probably a purse for some reason.

Q Okay. Do you recall ever having, saying that you saw a jacket before?

A No, I don't. I may have said at one time that she could have been toting a jacket and a purse rolled up

together.

Q No, you said, testified today that it was either a jacket, a purse or both.

A Yes.

Q Okay. Do you recall--

MR. BLAIR (interposing): Your Honor, I think his testimony was it could have been.

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q Could have been a jacket, purse or both. Okay. Do you recall testifying in a deposition with me on August 27th, 1979 at the office of the state attorney in Lake City, Florida?

A (Nods head affirmatively)

Q One of the same ones we have been talking about.

A Yes.

Q I asked you the question at page 79, Mr. Blair, "Do you recall a jacket or a coat," was my question.

Your answer was, "No, sir."

Question, "The only thing that you saw her carrying is what you are fairly certain now is a pocketbook?"

Answer, "Uh-huh. Yes."

"And she was carrying nothing else?"

Answer, "No."

Was that the truth when you testified?

A Yes.

Q Okay. Today, you are saying that she was carrying either a pocketbook or a jacket or both perhaps could be?

A Perhaps.

Q Okay. Did you discuss that portion of your testimony with Mr. Blair or Mr. Dekle?

A Not that I recall, no.

Q Have you ever identified Mr. Bundy as the man who looked very similar to the man that you saw--

A Yes.

Q Excuse me. Let me finish my question.

--that day in any other way other than on television?

A No, sir, I don't believe I have.

Q Or through pictures in the newspapers?

A No.

Q Has Mr. Blair or Mr. Dekle ever presented you with a photographic line-up and asked you to pick his picture out or pick the picture of the man that you saw on that date with that girl out of a group of pictures?

A No, sir, they have not.

Q Have they ever brought you into a room and marched a group of people in front of you and said, Pick out the man that you saw in front of the junior high with that little girl?

A No, sir, they have not.

Q So the only reason that you can testify here today that the man you saw on February 9th, 1978 with that little girl, that that man was Mr. Bundy is because of what you saw on TV?

A I don't believe I have ever stated that the man I saw was Mr. Bundy.

Q Okay. The man that looked similar to the man you saw with that little girl you are identifying from what you saw on TV?

A Yes, sir

Q And the man you saw on TV you know or knew at that time was or was about to be indicted for her disappearance, did you not?

A Yes, sir.

Q Knew he was considered the prime suspect in her disappearance and death?

MR. BLAIR: Your Honor, that's repetitious. He has already gone over those precise same questions.

THE COURT: Sustained. It's repetitious.

MR. AFRICANO: Okay. If I might have just one moment, please, Your Honor. Perhaps, Your Honor, we have been going at it for an hour and fifteen minutes.

THE COURT: No. Let's go ahead.

(Whereupon, Mr. Africano conferred with Mr. Thompson

and the defendant, after which the following proceedings occurred:)

CROSS-EXAMINATION (CONTINUED)

BY MR. AFRICANO:

Q How many times do you recall having driven from the fire station along the route that you just took, that you have just described?

A That's an impossible question. At this time, I think I had worked there seven or eight years, lived in the same residence for about the same length of time, passed there several times a day most every day. You know, there are other routes that I took. That was primarily the route I used most of the time.

Q Okay.

A Going to and from work, off duty, and going into overtime, it was the main route.

Q Do you ever recall going through there and going by there at or about the same time of day that you went by that day?

A I'm sure I did.

Q Do you ever recall being held up in traffic in front of the junior high during any of those times before?

A Yes.

Q Have you ever been held up waiting for a parent to pick up his or her child coming across the street?

THE WITNESS: Thank you, sir.

THE COURT: We will now take a recess. Ten minutes.

(Whereupon, a recess was had at 3:01 o'clock P.M. and Court reconvened after the recess in the presence of the jury, after which the following proceedings occurred:)

THE COURT: The State will call its next witness.

MR. DEKLE: Leland Douberley.

THE CLERK: Do you solemnly swear the testimony you are about to give in this cause at this time shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: You may be seated.

Thereupon,

LELAND DOUBERLEY

having been produced and first administered the above oath, testified as follows:

DIRECT EXAMINATION

BY MR. DEKLE:

Q State your name, please.

A Leland Douberley.

Q And your address?

A 402 South Columbia Street, Lake City, Florida.

Q And your occupation, Mr. Douberley?

IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,

Appellant,

vs. CASE NO. 57,772

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND CLARIFICATION

Appellant, THEODORE R. BUNDY, by and through his undersigned attorney, and pursuant to **Rule 9.330, Fla.R.App.Pro.**, moves this Court for a rehearing and says:

1. While Appellant is pleased that this Court has adopted the defense's arguments against the admissibility of the testimony of witnesses whose memory has been tainted by hypnosis, it is, to him, a pyrrhic victory.

It is respectfully submitted that this Court's declination to reverse Appellant's conviction and sentence and grant him a new trial, absent the testimony of C. L. Anderson, constitutes a misapprehension and oversight of the law and facts of this case of constitutional proportions.

2. In addition, Appellant requests this Court to clarify its opinion to specifically state what constitutional rights of an accused are violated by the State's use of a witness whose memory has been hypnotically tainted.

Appellant claimed at the trial below, and before this Court, that the admission of

A178

the testimony of C. L. Anderson violated the rights guaranteed to him under the Fifth and Sixth Amendments of the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution. Appellant assumes, in light of this Court's decision herein, that this Court has implicitly ruled that Appellant's claimed violations are constitutional in nature.

However, there should be no confusion or doubt on this point, not only for Appellant, but for future litigants. A clear statement of the constitutional import of this Court's decisions is vitally necessary.

3. The Court should also clarify the legal and/or factual basis upon which it affirmed the Appellant's conviction and sentence. Appellant is confused as to whether this Court's landmark decision establishing a new rule of criminal procedure regarding hypnosis has:

(a) no-retroaction application to him, or

(b) does have retroactive application to him, but that Anderson's testimony was harmless error because his memory was refreshed, under hypnosis, as to only three details (Court's Opinion, page 15), or if

(c) does have retroactive application to him, that Anderson's tainted testimony should not have been admitted, but that its admission was harmless because there was substantial competent evidence, absent the tainted testimony, upon which a jury could convict.

4. If (a) is the basis of this Court's affirmance of the decision below, it would be the only case Appellant has ever heard of in which the Appellant himself was not granted the application and benefit of the new constitutional rule of criminal procedure. In all of the cases researched by Appellant on the issue of the retrospective versus prospective application of a new rule of procedure, that issue is only debated in

a subsequent case which went to trial, or was on appeal or finally concluded when the new rule was established.

Even in those cases cited in this Court's opinion to support its decision not to apply Florida's new rule on hypnosis retroactively, the original Appellant in whose case the rule was established received the benefit of the rule.

In **State ex rel. Collins v. Superior Court**, 132 Arizona 180, 644 P.2d 1266 (1982), the Arizona Supreme Court held that its decision in **Mena v. State**, 128 Ariz 226, 634 P.2d 1274 (1981), would have only prospective application from the effective date of the **Mena** decision. However, **Mena** had his conviction reversed and the **Collins** trial Court's decision to suppress the tainted testimony was affirmed.

In **Stovall v. Deeno**, 388 U. S. 293, 18 L.ed 2d 1199, 87 S. Ct. 1967 (1967), also relied upon by this Court, the United States Supreme Court refused to give retroactive application to the rule it established in **United States v. Wade**, 388 U. S. 218, 18 L.ed 1149, 87 S.Ct. 1926 (1967), and **Gilbert v. California**, 388 U. S. 263, 18 L. ed. 2d 1178, 87 S.Ct. 1951 (1967), that an accused had a right to counsel at a lineup. However, **Wade** and **Gilbert** got the benefit of the new rule.

Likewise, in the three major cases involving the retroactive versus prospective application of a new rule of procedure leading up to **Stovall**, supra, the original Appellants got the benefit of the new rule.

In the 1965 case of **Linkletter v. Walker**, 381 U. S. 618, 14 L.ed 2d 601, 85 S.Ct. 1731 (1965), the Supreme Court refused to give retroactive application to its ruling in **Mapp v. Ohio**, 367 U. S. 643, 6 L.ed 2d 1081, 81 S.Ct. 1984 (1961), which held that the Federal "exclusionary rule" announced in **Weeks v. United States**, 232 U. S. 383, 58 L.ed 652, 34 S.Ct. 341 (1914), was binding upon the states through the Fourteenth Amendment in state court convictions.

However, **Mapp** got the benefit of the new rule.

In 1966, the Supreme Court decided **Tehan v. Schott**, 382 U.S. 406, 15 L.ed 2d 453, 86 S.Ct. 459, reh.den., 383 U.S. 931, 15 L.ed 2d 850, 86 S.Ct. 925 (1966). In **Tehan**, supra, the Supreme Court declined to give retroactive application to its ruling in **Griffin v. California**, 380 U. S. 609, 14 L.ed 2d 106, 85 S.Ct. 1229, holding it unconstitutional for a prosecutor or trial judge to make adverse comment upon a defendant's failure to testify in a state criminal trial.

But, **Griffin** got the benefit of the rule.

The third pre-**Stovall** case in which the United States Supreme Court dealt with the retroactive application of a newly adopted constitutional rule of criminal procedure was **Johnson v. New Jersey**, 384 U. S. 719, 16 L.ed 882, 86 S.Ct. 1779 (1966). In **Johnson**, supra, the Supreme Court refused to give retroaction application to its rulings on the voluntary nature and admissibility of extrajudicial confessions announced in **Escobedo v. Illinois**, 378 U. S. 478, 12 L.ed 2d 927, 84 S.Ct. 1754 (1964), and **Miranda v. Arizona**, 384 U. S. 436 16 L.ed 694, 86 S.Ct. 1602 (1966).

Likewise, **Escobedo** and **Miranda** got the benefit of the new rule.

5. If (b) is the basis of this Court's affirmance and the Appellant has gotten the benefit of the new rule, then his conviction should be reversed because the Court in this opinion has characterized Anderson's testimony as tainted (Court's Opinion, page 15). If Anderson's testimony was tainted, it should have been excluded altogether, or limited in accordance with the Court's first exception to the new rule, i.e., "A witness could testify to all events other than the new matters discovered at the hypnotic session" (Court's Opinion, page 14). However, Anderson was allowed to testify to both his prehypnotic and posthypnotic recollections.

In addition, it appears from the language of the Court's Opinion that it is this

Court's impression that Anderson's testimony was refreshed under hypnosis as to only three details, to-wit: "The football jersey which the girl was wearing was blue and the numbers were '63 or '68. He was also able to remember that part of the man's attire was a pullover sweater and a shirt." (Court's Opinion, page 15)

What this Court has overlooked is what Anderson did not remember, e.g., the Leach girl's rather distinctive coat. Had Anderson been actually reliving, under hypnosis, what ultimately became his "eyewitness account" of the abduction, he certainly would have been able to see and describe her coat, which she was known to have been wearing. Did he actually recall the numbers on the football jersey and its color or was he confabulating a response based upon all of the information he had received during the six months prior to his revelation?

The Court also overlooks the fact that Anderson had no memory for six months after the alleged abduction, although he was abundantly aware of the disappearance during the entire six months, and had seen pictures of the Leach girl and a description of what she was wearing.

Also overlooked is the fact that in his prehypnosis interviews and during his two hypnotic sessions, he was asked to describe the girl. At no time did he say, "She looked like my niece", although he had seen the Leach girl's picture hundreds of times. Yet, afterward he described her as looking like his niece.

Likewise, the Court overlooks the fact that Anderson was a Lieutenant in the Lake City Fire Department, trained and dedicated to "ride to the rescue" and save people's lives. To adopt his and the State's excuse that he didn't want to "get involved" for approximately six months, when the entire community was clamoring for the crime to be solved, stretches credulity beyond its rational limits.

The Court overlooks the fact that Anderson had no prehypnotic recollection of when he "saw" this event. However, he was told by State investigators, between the times of

his two hypnotic sessions, the date the Leach girl disappeared, and then miraculously "remembers" the date she disappeared, and why he remembers, while undergoing his second hypnotic session.

Finally, the Court overlooks the fact that the State failed, albeit through innocent ignorance, to make any valid attempt to preseve an accurate record of Anderson's prehypnotic memory. Thus, how can anyone, much less this Court, say what was Anderson's prehypnotic memory. It also must be remembered that the trial court viewed Anderson's testimony against the backdrop of the old law on hypnosis. The trial court and the state cannot be faulted for not perceiving how the law on hypnosis would evolve. However, Appellant should not die because of their lack of perception.

The adoption of new rules of procedure are intended to correct past mistakes, however innocently made. Likewise, convictions and sentences are to be reversed if mistakenly rendered.

6. Finally, if (c) is the basis for the Court's affirmance, then this Court has failed to delineate what other sufficient evidence existed, absent the tainted testimony, upon which the jury could have based its conviction. Was it the fibers, the shoe tracks, the Edenfield and/or Parmenter identification? Was it the fact that the Appellant checked into the Lake City Holiday Inn the night before the abduction or the evidence of flight? If so, Appellant respectfully submits that such highly circumstantial evidence would have had little or no significance without the positive eyewitness identification of C. L. Anderson and the admission of his testimony cannot be deemed "harmless error".

Appellant respectfully submits that this Court's reliance on **Schneble v. Florida**, 405 U. S. 427 31 L.Ed 2d 340, 92 S.Ct. 1056 (1972) is a misapprehension of the law.

In **Schneble**, supra, the U. S. Supreme Court was dealing with a violation of the

Bruton Rule. The **Schneble** Court found that:

> "...The mere finding of a violation of the Bruton Rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error". **Schneble**, supra at 430.

In **Schneble**, supra, the Appellant's properly obtained and admitted confession was minutely detailed and completely consistent with the objective evidence. The admission of **Schneble's** co-defendant's extrajudicial statements, which admittedly was a Bruton violation, only contradicted **Schneble's** initial account of the incident in which he denied being the perpetrator of a murder. In light of his subsequent and properly admitted detailed confession to committing the actual murder of the victim, the Burton violation was held harmless error.

In **Faye v Connecticut**, 375 U.S. F.5, II L.Ed. 2d 171, 84 S.Ct. 229 (1963), which this Court cites as authority for the application of the "harmless error" rule in this case, the U. S. Supreme Court held that the admission of illegally seized evidence was <u>not</u> harmless error, not withstanding the subsequent extrajudicial confessions and the trial testimony of the Defendants that they had committed the crime. The **Faye** Court held that since the illegally obtained evidence corroborated other circumstantial evidence of guilt and, because the discovery of same may have induced the Defendants to confess and may have led the Defendants into admitting their crime at trial, its use was so prejudicial as to require reversal of conviction.

The facts of these cases and the principles of law enunciated therein cannot be cited to support this Court's conclusion that C. L. Anderson's testimony had no impact upon the jury in this case, nor that there was independent and sufficient competent evidence of guilt in the absence of his testimony.

C. L. Anderson was the one and only witness in the trial of this case who positively and without hesitation put Appellant and the victim in the actual presence of each other at the alleged scene of the abduction. Absent his testimony, the fibers, shoe tracks, and other circumstantial evidence would have been speculative and conjectural. This Court cannot, and should not, speculate on the weight the jury may have given such evidence, which has been buttressed and given foundation, credence, and corroboration by the admittedly inadmissible evidence of the only purported eyewitness to the crime.

To do so would tarnish the legal importance and impact of the constitutional safeguards this Court has attempted to accomplish in this landmark case involving hypnosis.

7. Appellant also respectfully contends that this Court's rationale for affirming the trial court's denial of the Appellant's Motion for a view places him in a "Catch 22" situation. If Appellant has properly construed this Court's ruling that C. L. Anderson's tainted testimony should have been excluded, how can the denial of the Motion for a view be affirmed on the basis that the defense counsel had substantial opportunity, which he exercised, to cross-examine Anderson? (Court's Opinion, page 17)

First of all, if this Court has ruled that Anderson's testimony was inadmissible, there would have been no need for cross-examination, or the view, for that matter.

Secondly, this Court's reliance on defense counsel's ability to cross-examine Anderson totally ignores the unrefuted opinions of the experts in the field[1] and case

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[1] "The faith which the above Courts placed in the power of cross examination also seems misplaced. One article claims that 'the subsequent opportunity for cross examination at the trial is virtually ineffective as a means of assuring no false suggestions have been implanted'". **Mena**, supra, at 1278 (Citing Spector and Foster, Admissibility of Hypnotic Statement: Is the Law of Evidence Susceptible? 38 Ohio St. L.J. 567 (1977)

law embraced by this Court; that hypnosis precludes the accused's right of confrontation because it impairs, if not precludes, the effective ability to cross-examine a witness who has been previously hypnotized.

As specificially stated in **Collins**, supra:

> "The testimony of persons who have previously undergone hypnosis is inadmissible for two distinct reasons: the process of hypnosis and its outcome is inherently unreliable; and to permit posthypnotic testimony would violate the Appellant's Sixth Amendment right to cross examine. (Emphasis supplied) **Collins**, at page 1269.

This Court also upholds the trial court's denial of Appellant's Motion for a view because:

> "The record shows the road had been widened and four laned which would have changed distance evaluation and traffic patterns". (Court's Opinion, page 17)

It is respectfully submitted that the record shows that State Attorney Blair argued that the road had been widened (T. 5592). Nowhere in the record is it shown that such widening would have changed distance evaluation; especially the critical distances on the Junior Highschool campus or the overall view.

Nor did the trial court find that the widening of the road was a factor in denying the Motion. (See page 75 of Appellant's Main Brief)

B. Finally, as to the rule now adopted by this Court governing hypnosis. By adopting an inadmissible, per se, rule,but allowing a witness to testify as to his or her pre-hypnotic recollection, without giving the lower courts and litigants of this State any judicial guidance as to the protocols to be followed in the use of hypnosis, will only create further litigation and perpetuate the misuse of hypnosis.

Appellant respectfully directs the Court's attention again to **Collins**, supra, at pages 1295-1299, where both the majority and dissent of Vice Chief Justice Gordon express very serious concern and doubt that a hypnotized witness does, in fact, have any

prehypnotic memory.

If this Court is going to allow a hypnotized witness to testify as to his or her prehypnotic memory, then very strict guidelines should be established regarding the preservation of the prehypnotic memory and the hypnotic protocols to be used.

CONCLUSION

Appellant could no more eloquently conclude what he has tried to express in this Motion than to quote from Chief Justice Boyd's specially concurring opinion:

> "...thus it appears to me that the majority's rule of per se inadmissibility is merely an advisory opinion to the courts of Florida because it is not necessary to apply the rule in this case. This observation brings me to my only real objection to the majority opinion and the reason for the writing of this separate opinion.
>
> When a person tried for and convicted of a crime challenges the conviction on appeal on the ground, properly raised at trial, that a crucial and prejudicial item of evidence against him was unreliable evidence and improperly admitted, and the appellate court rules that the evidence was indeed unreliable and prejudicial, then that appellant is entitled to the benefit of the ruling and should be given a new trial. This is so regardless of previous reliance on the old rule or previous ambiguity in the law. Therefore if we were faced with a situation where the crucial identification testimony was actually obtained through improper use of hypnosis, we would be required to reverse the conviction. To apply a new rule of inadmissibility of evidence in a criminal trial prospectively only is highly improper." (Court's Opinion, page 24)

For the reasons advanced herein, the conviction and sentence of Appellant should be reversed and the Court's Opinion clarified.

Respectfully submitted,

J. VICTOR AFRICANO
Attorney for Appellant
P. O. Box 1450
Live Oak, Florida 32060
(904) 362-6930

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Honorable Jim Smith, Attorney General, Suite 1502, The Capitol, Tallahassee, Florida 32301, by U. S. Mail on this 23rd day of May, 1985.

J. VICTOR AFRICANO

A/88

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE ROBERT BUNDY, Petitioner,

v.

STATE OF FLORIDA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

CERTIFICATE OF SERVICE

I, James E. Coleman, Jr., a member of the Bar of this Court, hereby certify that on this 21st day of May, 1986, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first-class postage prepaid, to Jim Smith, Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301.

James E. Coleman, Jr.
1666 K Street N.W.
Washington, D.C. 20006
(202) 872-6000